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No. _____

In the Supreme Court of the United States

October Term, 1987

SESSIONS TANK LINERS, INC., d/b/a SOUTHWEST TANK LINERS, INC.,

Petitioner,

v.

JOOR MANUFACTURING, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Does the *Noerr-Pennington* doctrine, which immunizes petitioning of governmental bodies from antitrust liability, similarly immunize from antitrust liability lobbying of a private standards-setting organization that promulgates a model fire code that is often adopted as law by state and local governments?*

THE PARTIES**

Petitioner Sessions Tank Liners, Inc., d/b/a Southwest Tank Liners, Inc. ("Southwest"), is engaged in the business of repairing and lining underground storage tanks used primarily in gasoline service stations.

Respondent Joor Manufacturing, Inc. ("Joor"), manufactures and sells new underground storage tanks used primarily in gasoline service stations.

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*This Court recently granted *certiorari* to review this identical issue in *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938 (2d Cir. 1987), *cert. granted*, 56 U.S.L.W. 3203 (U.S. Oct. 5, 1987) (No. 87-157). Because of the similarity of both the legal and factual issues, petitioner respectfully requests the Court consider consolidating the instant case with *Indian Head*.

**Western Fire Chiefs Association ("WFCA") is a private trade association engaged, *inter alia*, in the task of developing, publishing and disseminating the Uniform Fire Code ("UFC"). The UFC sets forth recommended safety standards and its provisions are frequently enacted into law by local governments. The WFCA is not a party to the instant lawsuit.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW[1]

The opinion of the Court of Appeals for the Ninth Circuit is reported at 827 F.2d 458 (9th Cir. 1987) and appears as Appendix A, pp. A1-A23. The opinion of the District Court granting partial summary judgment

[1]The opinion of the Court of Appeals for the Second Circuit in *Indian Head, Inc. v. Allied Tube & Conduit Corp.* is reported at 817 F.2d 938 (2d Cir. 1987) and appears as Appendix C, pp. C1-C23.

against Southwest is published in 1986-1 Trade Cas. (CCH) ¶ 66,989 (C.D. Cal. 1986) and appears as Appendix B, pp. B1-B12.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 2, 1987. Southwest did not file a petition for rehearing. Jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sherman Act, 15 U.S.C. § 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal.

The Sherman Act, 15 U.S.C. § 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

A. Jurisdiction and Timeliness of Appeal.

Southwest appealed from a decision of the United States District Court for the Central District of California granting partial summary judgment against it pursuant to Rule 56, Fed. R. Civ. P. The trial court had subject matter jurisdiction over the proceedings below pursuant to 15 U.S.C. §§ 15, 26.

The Court of Appeals for the Ninth Circuit had jurisdiction of the appeal from the District Court's decision pursuant to either Rule 54, Fed. R. Civ. P. or 28 U.S.C. § 1292(b). On June 10, 1986, the District Court entered an order directing entry of partial summary judgment pursuant to Fed. R. Civ. P. 54(b) and certifying its order for appeal pursuant to 28 U.S.C. § 1292(b). On July 9, 1986, Southwest timely filed its notice of appeal pursuant to 28 U.S.C. § 2107 and Rule 4(c), Fed. R. App. P. On October 7, 1986, the Court of Appeals for the Ninth Circuit entered an order granting Southwest's petition to appeal under 28 U.S.C. § 1292(b).

B. Statement of Facts.

1. Background.

Southwest is engaged in the business of repairing underground petroleum storage tanks and employs a tank lining process developed and produced by the Bridgeport Chemical Corporation of Pompano Beach, Florida. (CR 47, ¶ 6; CR 49, ¶ 8.) Under this process, tanks can be repaired while remaining underground. (CR 49, ¶¶ 8-10.) Southwest's technique involves the use of an epoxy coating to line the tank's interior and thereby repair and prevent leaks. (*Id.*) The alternative to tank

lining is for the owner of a leaking underground storage tank to replace the tank or to remove it from the ground for repairs. (*Id.* at ¶ 10.) However, both replacement and aboveground repair are far more expensive than repairing the tank by lining it while it remains in the ground. As a business entity involved in the manufacture and sale of underground storage tanks, Joor competes directly with Southwest. Because Southwest's services cost only a fraction of the price of a new storage tank, Joor had strong incentive to take action to negate the competitive advantage enjoyed by tank liners like Southwest.

Southwest was purchased by its present owner in 1974. (CR 47, ¶ 5.) From 1976-1980 Southwest enjoyed steady growth and increased from five to thirteen employees. (*Id.* at ¶ 7.) From 1980 on, however, Southwest has experienced a substantial decline in sales, especially in California, as the demand for its tank lining services lessened dramatically. (*Id.* at ¶¶ 7-8; CR 49, ¶¶ 12-19.)

2. The Article 79 Subcommittee.

In the late 1970's, the WFCA established a committee comprised of public officials and members from private industry and charged it with the task of rewriting Article 79 of the Uniform Fire Code ("UFC"). Article 79 sets safety regulations for underground storage tanks. (CR 53, Exhibit 2.) This committee became known as the Article 79 Subcommittee. Joor chose to use the Article 79 Subcommittee as the instrument of its plan to put Southwest out of business.

As reflected in the minutes of the Article 79 Subcommittee's June 12, 1979, meeting, representatives of the storage tank manufacturing industry were invited to join the Subcommittee, including Joor's president,

Howard Robbins, who began attending Subcommittee meetings as early as December 10, 1979. (*Id.* at Exhibits 2 and 3.) No membership invitations, however, were extended to representatives of companies engaged in the tank lining business. (CR 47, ¶ 11.) In September 1980, Southwest's president attended an Article 79 Subcommittee meeting and, on or about that time, unsuccessfully asked that he be allowed to join as a voting member. (CR 47, ¶ 12.) It was not until 1982—after the Article 79 Subcommittee had revised the UFC to Southwest's detriment—that a Southwest representative was allowed, on a single occasion, to sit on the Subcommittee as a voting member. (CR 47, ¶ 12; CR 49, ¶ 20.)

3. Joor's Use of the Article 79 Subcommittee to Restrain Trade.

As mentioned above, Joor's president, Robbins, was a voting member of the Article 79 Subcommittee. In that capacity he worked to rewrite Article 79 to require that leaking storage tanks be removed from the ground before being repaired. On March 3, 1981, Robbins sent a letter to the Article 79 Subcommittee sharply criticizing the tank lining process. (CR 53, Exhibit 12.) In this letter, he commented negatively on a packet of materials that Southwest had submitted for consideration at the Subcommittee's February 1981 meeting. (CR 47, ¶ 14; CR 53, Exhibit 11.) Robbins stated that leakage indicates that a storage tank's structural integrity has been degraded and that it is impossible to determine the remaining thickness of the tank's metal without removing the tank from the ground. (CR 53, Exhibit 12.) Robbins went on to express his belief that the use of Southwest's tank lining technique would result in repudiation of UL-58, the standard underground steel tank structural specifications promulgated by Underwriters Laboratories. (*Id.*)

On March 17, 1981, the Article 79 Subcommittee met to take final action on the tank lining provisions of the UFC. Southwest representatives attended the meeting and were allowed to make a presentation. (CR 47, ¶ 15; CR 53, Exhibit 13.) However, Southwest's representatives were asked to leave the room while the Subcommittee debated the tank lining issue. (CR 47, ¶ 15.) The Subcommittee's minutes reflect that the following then transpired:

> *Robbins* moved, Steinkoenig seconded, that Section 79.601 be amended by adding a Subsection (d) to read, "Leaking tanks shall be removed from the ground" and add a Subsection (e) to read, "Used tanks may be reinstalled if they comply with the requirements of Section 79.105 and Section 79.603." Carried unanimously.

(CR 53, Exhibit 13.) (emphasis added.)

The rationale for the Subcommittee's action was that the act of "cutting an opening in a tank"—necessary to commence lining—meant "destroying the integrity of the UL approval to proceed with the lining process." (*Id.*) These concerns paralleled those raised in Robbins' March 3, 1981, letter to the Subcommittee. However, Robbins' criticism of tank lining was false and deceptive and the Subcommittee, therefore, was induced to act on the basis of technical assumptions that were, in fact, untrue. In March 1983, UL wrote to Southwest and categorically stated that the UL label is not "voided" when an opening is cut in a tank for the purpose of repairing it. (CR 49, ¶ 17.) Moreover, there are no legitimate health or safety reasons necessitating the removal from the ground of leaking tanks. With the

use of ultrasonic instruments, the existence of leaks and a tank's structural strength can be determined while the tank remains in the ground. (CR 50, ¶ 16.)

4. Joor's Campaign Against Southwest.

Joor's use of the Article 79 Subcommittee to harm Southwest was part of Joor's concerted effort to discourage consumers from utilizing tank lining. In 1980, Southwest routinely applied to the San Diego Fire Department for a permit to repair underground storage tanks. (CR 47, ¶ 9.) Previously, Southwest had performed numerous tank repairs in San Diego and had never had any difficulty in obtaining the necessary permits. (*Id.*) On this occasion, however, Southwest's permit application was denied. (*Id.* at ¶ 10.) While at the San Diego Fire Department in a vain attempt to secure a permit, a fire department official told Southwest's president about the WFCA's Article 79 Subcommittee. (*Id.*) The official said that Southwest should contact the Subcommittee because Southwest's business would probably be destroyed as a result of the Subcommittee's actions. (*Id.*) Southwest had not previously been informed, officially or otherwise, of the Subcommittee's activities. (*Id.* at ¶ 11.) On at least six occasions in 1981-1982, Southwest was denied repair permits by the Fire Departments in several California cities. (CR 49, ¶¶ 12-19.) Invariably, Southwest's permit requests were denied in the belief that the tank lining process would cause the UL label to be "voided". (*Id.*) It should be remembered that Robbins had circulated this false information to the WFCA's Article 79 Subcommittee.

5. The Proceedings Below.

Southwest commenced this action on August 27, 1984. (CR 1.) Southwest's complaint alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 and sought damages and injunctive relief pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. Southwest also sought relief for various pendent state claims. On May 31, 1985, Joor moved for summary judgment, which was heard by the trial court on July 1, 1985. On January 17, 1986, the district court issued its memorandum of decision and order granting partial summary judgment for Joor. (CR 73.) On June 6, 1986, the trial court, pursuant to Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1292(b), certified for appeal its order granting partial summary judgment. (CR 93.) The district court granted partial summary judgment for Joor on the ground that Joor's activities on the Article 79 Subcommittee constituted good faith lobbying of a quasi-governmental agency and thus was protected by the *Noerr-Pennington* doctrine. (CR 73:5-7.)

REASONS FOR GRANTING THE WRIT

A. Introduction.

Coupled with *Indian Head*, the instant petition squarely raises an issue of first impression for this Court: Does the *Noerr-Pennington* doctrine immunize petitioning activity intended to influence the decision of *private* standards-setting organizations like the WFCA? In *Indian Head*, the Court of Appeals for the Second Circuit held that such conduct is *not* immunized by *Noerr-Pennington*. In the instant case, the Court of Appeals for the Ninth Circuit reached the opposite result. Thus the federal courts of appeal encompassing the nation's two largest commercial centers (New York and Los Angeles) are squarely in conflict on this issue of critical importance.

B. The *Noerr-Pennington* Doctrine Does Not Confer Antitrust Immunity on Joor's Petitioning of the WFCA.

In a trilogy of cases, the Supreme Court has enunciated a doctrine that attempts to reconcile First Amendment values with the objectives of antitrust policy. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609 (1972).

In *Noerr* a group of long-distance trucking companies alleged that twenty-four major railroads, an association of their presidents and a public relations firm conspired to restrain trade in the long-distance freight business. As part of a long-standing and intense rivalry with the trucking companies, the railroads undertook a publicity campaign to sway public opinion and persuade

Pennsylvania's legislature and Governor to take action beneficial to the railroads and harmful to the trucking industry. The railroads sought to accomplish their goals both through lobbying and dissemination of information, some of which was deceptive and misleading.

In *Noerr*, the Supreme Court recognized that an uninhibited flow of information between citizens and public officials is vital to our representative form of government:

> In a representative democracy such as this, these branches of government [the legislative and executive] act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

Noerr, 365 U.S. at 137, 81 S. Ct. at 529.

The Court further stated that attempts to influence the legislative and executive branches fall within the Bill of Rights' guarantee of the right to petition:

> The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing

considerations enumerated above.

Id. at 138, 81 S. Ct. at 530.

Because the Sherman Act is intended to regulate business—not political activity—the Court held that it does not proscribe concerted efforts to secure governmental action, even when the petitioners' goals are intentionally and undeniably anticompetitive:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns . . . [T]his has not been done by anything in the Sherman Act.

Id. at 143-44, 82 S. Ct. at 533.

In *United Mine Workers,* the Supreme Court addressed allegations that a group of large coal companies and the United Mine Workers union conspired to restrain competition in the coal industry. The complaint charged the coal companies and the union with persuading the Secretary of Labor to establish a minimum wage for the coal industry higher than that set for other industries, thereby making it difficult for smaller, less mechanized companies to compete. The complaint further alleged that the defendants had urged the Tennessee Valley Authority to decrease its spot market purchases of coal to a level harmful to the smaller

companies, which were more dependent than the large companies for such purchases.

Both the district court and the Sixth Circuit rejected the claim of Sherman Act immunity on the ground that *Noerr* shelters only petitioning that is not intended to further a conspiracy to violate the antitrust laws. The Supreme Court reversed, however, stating simply: "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *United Mine Workers*, 381 U.S. at 670, 85 S. Ct. at 1593. The Court went on to observe that: "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Id.*

In *California Motor Transport*, the Supreme Court held that the rights of association and petition encompass appeals made to regulatory and administrative agencies and to courts.

It can readily be seen that the *Noerr-Pennington* doctrine's development reflects the Supreme Court's deep concern with protecting the free flow of information from private citizens to the *government* and with preserving unfettered private citizens' access to *governmental* organs. Whether the policy values implicated by *Noerr-Pennington* should immunize Joor's petitioning of the WFCA is, however, an entirely different matter.

Standards-setting organizations oftentimes have a nearly determinative voice on such matters as product or building safety because legislatures do, in fact, rely on model fire, building, electrical and plumbing codes. Indeed, these model codes are often incorporated in

legislation with little or no change. However, notwithstanding the pivotal role such private standards-setting organizations frequently play in the governmental process, there are no compelling reasons that support extending *Noerr-Pennington* immunity to petitioning activity directed to them.

Standards-setting and professional organizations are not governmental within the rationale underlying the *Noerr-Pennington* doctrine. Standards set by such groups can easily exclude competitors and thereby suppress—or even eliminate—competition. Extending antitrust immunity to the actions of such private organizations strikes a serious blow at the principle of economic competition. In the case of the WFCA, for example, neither its membership nor its leadership is elected by, or answerable to, the body politic. Although organizations like the WFCA *may* seek to promote "the public interest" it often is the public interest as conceived by a particular industry or by an individual participant within the industry. In contrast, at least theoretically, legislatures have a more all-encompassing view of the common good. Whether reviewing an issue directly or delegating it to an administrative entity, legislatures consider the interests of consumers, potential market entrants, rival industries and affected segments of the public at large. In this context, the requirement that public officials have unrestricted access to public views and information overrides the Sherman Act's procompetition values. Indeed, in *Noerr* the Court repeatedly emphasized the importance the public's ability to "freely inform the *government* of their wishes . . . ." *Noerr*, 365 U.S. at 137, 81 S. Ct. at 529. (emphasis added.) These crucial policy concerns—indispensable to the proper functioning of a representative democratic political system—are considerably less urgent when viewed in the

context of petitioning directed at *private* standards-setting organizations. Thus, as the Fifth Circuit has stated, where "political considerations are absent the *Noerr* doctrine is inapplicable." *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1296 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047, 92 S. Ct. 701 (1972).

If the *Noerr-Pennington* doctrine is extended to cover private standards-setting organizations like the WFCA, very serious policy questions arise. If a private organization performs quasi-legislative functions, must it represent the public interest, broadly defined? If so, would it still be an effective instrument for voicing the specific concerns of its members? Moreover, there are over 420 private standards-setting organizations in the United States, which promulgate more than 32,000 standards.[2] Which of these should be considered quasi-governmental for *Noerr-Pennington* purposes? How should such a determination be made, by legislative, executive or judicial action? If a private standards-setting organization is vested with quasi-governmental status, should the rules pertaining to its internal governance be subject to the legal and procedural strictures of administrative law? For example, do the "due process" protections enunciated in *Silver v. New York Stock Exchange*, 373 U.S. 341, 361-62, 83 S. Ct. 1246, 1259 (1963) apply and, if so, how are they to be implemented? The absence of any principled resolution of these kinds of problems should, as a matter of policy, preclude the conferral of quasi-governmental status on private standards-setting organizations.

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[2]National Bureau of Standards, Standards Activities of Organizations in the United States, NBS Special Publication 681, at 1 (Aug. 1984).

Refusing to extend *Noerr-Pennington* immunity to petitioning of entities such as the WFCA will not chill the exercise of First Amendment rights to petition the government. The Supreme Court has long-recognized that not all speech is entitled to the same level of Constitutional protection. In this regard, there is a clear distinction between commercial speech and political speech. As the Supreme Court said in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456, 98 S. Ct. 1912, 1918 (1978):

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

As the Supreme Court reiterated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563, 100 S. Ct. 2343, 2350 (1980), the Constitution accords a "lesser protection" to commercial than to political speech; therefore, "[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." In the instant case, Joor petitioned the WFCA (a private standards-setting organization) to take action specifically intended to place Joor's business competitors—including

Southwest—at a severe economic disadvantage in the market for underground storage tank repair and replacement. It is difficult to see why Joor's petitioning efforts rise to such a constitutionally sensitive level as to justify a decision that the Sherman Act's procompetitive purposes must, in this instance, give way to First Amendment concerns.

Of course, a different result would be indicated if Joor's efforts were, in fact, directed at petitioning a governmental entity. Obviously, if Joor had petitioned state or local *governmental* bodies to adopt the WFCA's model code, its actions at least would be protected *prima facie* by *Noerr-Pennington*. But there is no policy reason that compels a rule immunizing Joor's background petitioning of the WFCA. A number of cases have, in fact, distinguished between underlying private petitioning in furtherance of a conspiracy to restrain trade and actual petitioning of government.

In *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 601-02, 96 S. Ct. 3110, 3123 (1976), the Supreme Court held that anticompetitive conduct is not immunized from the antitrust laws merely because the conduct results in a proposal which is later adopted by a governmental agency. The courts have further held that the filing of governmentally required tariffs are not *Noerr-Pennington* protected. In *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073, 104 S. Ct. 984 (1984), AT&T filed a tariff required by the Federal Communications Commission. AT&T's tariff required that competitors' products use an AT&T manufactured interconnector device to join their products into the AT&T system. Although FCC rules required AT&T to file a tariff, the FCC did not deliberate on its propriety

and the degree of government decision-making was, at best, slight. The Second Circuit held that AT&T's tariff filing was not protected by the *Noerr-Pennington* doctrine. *Id.* at 807-808. *See also United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469, 477 (5th Cir. 1982), *rev'd on other grounds*, 471 U.S. 48, 105 S. Ct. 1721 (1985); *Massachusetts Furniture & Piano Movers Association v. FTC*, 102 F.T.C. 1176 (1983); *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1181 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170, 103 S. Ct. 814 (1983). Similarly in *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied sub nom. Palmer v. Feminist Women's Health Center, Inc.*, 444 U.S. 924, 100 S. Ct. 262 (1979), the Fifth Circuit also drew a distinction between underlying private activity in restraint of trade and the discreet act of petitioning a governmental agency. In that case, the medical staff of a hospital engaged in a number of actions designed to discourage local doctors and medical students from lending their services and support to a women's health center, because the health center was believed to be violating professional medical standards. The medical staff also asked the State Board of Medical Examiners (BOME) to take action against the health center. The Fifth Circuit held that the latter activity was immunized by *Noerr-Pennington* but the former was not.

The reasoning of the tariff-filing cases and *Women's Feminist Health Center* is precisely analogous to the instant case.[3] Joor's petitioning of the WFCA is only

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[3]Indeed, *Noerr-Pennington* immunity is even less justified in standards-setting than in tariff-filing situations. Unlike tariff-filing, model code development is not governmentally required. And model code development poses a greater risk of antitrust harm because codes tend to affect a more extensive range of industry or

incidental to its goal of having state and local governments adopt regulations adverse to underground tank liners like Southwest. The WFCA is a private organization. Its decision to adopt a rule or regulation does not make that rule or regulation law. When a competitor petitions an entity like the WFCA to adopt a regulation in furtherance of a restraint of trade, there are no policy reasons that support extending *Noerr-Pennington* immunity to that type of petitioning activity. Only if Joor directly petitioned the government would the Sherman Act's concerns with competition be forced to give way before the First Amendment's political speech imperatives.

CONCLUSION

The applicability of *Noerr-Pennington* to lobbying activities directed at private standards-setting organizations presents important public policy issues that arise at the interstice between antitrust law and the First Amendment. Given the sharp conflict between the Ninth Circuit's decision in this case and the Second Circuit's *Indian Head* decision, petitioner Southwest respectfully requests that the instant petition be granted and that this case be consolidated with *Indian Head* for appeal to this Court.

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professional performance, have broader geographic impact, and more seriously threaten the de facto exclusion of competitors from the marketplace.

Dated: October 26, 1987

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SESSIONS TANK LINERS, INC. dba SOUTHWEST TANK LINERS, INC.,
Plaintiff-Appellant,

v.

JOOR MANUFACTURING, INC., et al.,
Defendants-Appellees.

Nos. 86-6208; 86-6470

D.C. No. CV-84-6363-MRP

OPINION

Argued and Submitted
April 8, 1987—Pasadena, California

Filed September 2, 1987

Before: Joseph T. Sneed, Robert Boochever and David R. Thompson, Circuit Judges.

Opinion by Judge Sneed

Appeals from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

SUMMARY

Antitrust

Appeal from grant of summary judgment. Affirmed in part, reversed and remanded in part.

Appellant Sessions Tank Liners, Inc. (Sessions) is in the business of coating and repairing underground gasoline stor-

age tanks, making replacement unecessary. Appellee Joor Manufacturing, Inc. (Joor) provides replacement tanks, and is therefore in competition with Sessions. Sessions alleged that its business in California began to decline due to Joor's proposed amendment to the Western Fire Chief's Association (WFCA) Uniform Fire Code. Joor's president had argued strenuously that the underground tank lining process (used by Sessions) should be completely prohibited, and his position was adopted and made part of the Code. Sessions brought suit under the Sherman Act, alleging that Joor combined with other tank manufacturing interests to procure an unreasonable restraint of trade, and that Joor was attempting to monopolize the relevant market. The district judge granted Joor's motion for summary judgment, ruling that the *Noerr-Pennington* doctrine exempted Joor's conduct from antitrust liability.

[1] The *Noerr-Pennington* doctrine, which exempts the petitioning of governmental bodies from antitrust action, applies to proper lobbying of a private association engaged in promulgating an important model code to influence legislative and executive decisions. [2] Although Joor's efforts were directed at an ostensibly private body, they were without doubt part of a plan ultimately to procure favorable legislation by local governmental bodies who look to the Uniform Fire Code for guidance. [3] First amendment purposes are served by extending *Noerr-Pennington* to the circumstances of this case, [4] and the extension would also promote the affective operation of our political processes. [5] Joor's president's proposal had no legal force until adopted by local legislatures, and acts of these governmental officials should not make Joor liable under the Sherman Act.

[6] The analysis of a recent second circuit case finding that *Noerr-Pennington* does not apply to a case involving improper lobbying of a model code association much like the WFCA was flawed because the proper focus of such subversion should be the applicability of *Noerr-Pennington*'s excep-

tions. [7] Session's argument that *Noerr-Pennington*'s sham exception applies because it was denied access to the WFCA because it had no voting representative fails because there is no evidence that Joor was responsible for this exclusion. [8] Also, despite the fact that the position of Joor's president on the subcommittee recommending the change in the code creates an appearance of impropriety, Sessions has not made a sufficient showing that Joor or other tank manufacturing interests combined with Joor to capture the WFCA. [9] Sessions further complained that certain statements made by Joor were deceptive, but the district court concluded that the statements were simply part of a reasoned argument, and that while Joor might have been wrong, the WFCA could not have been misled by what Joor said. [10] It is possible that the court's conclusion was erroneous for summary judgment purposes, however. [11] Although alleged misrepresentations in a publicity campaign designed to influence legislation are political activity and not actionable under the Sherman Act, [12] that principle does not extend to Joor's alleged misrepresentations made outside the WFCA lobbying process, before the Code was amended, to local fire officials who thereafter denied Sessions the requisite permits for carrying on its work. [13] Misrepresentations made to an executive official falls between the roles established in the legislative context (where misrepresentations are not actionable) and the adjudicative context (where they are actionable). [14] If Sessions's allegations are true, the fire officials were asked to respond in an administrative capacity. These allegations state a limited sham exception claim.

COUNSEL

Maxwell M. Blecher and Christopher Layne, Los Angeles, California, for the plaintiff-appellant.

David E. Lundin, San Diego, California, for the defendants-appellees.

William J. Meeske, Los Angeles, California, Catherine G. O'Sullivan and Dean C. Graybill, Washington, D.C., for the amici curiae.

OPINION

SNEED, Circuit Judge:

Joor Manufacturing (Joor) successfully sought to have the Western Fire Chiefs Association (WFCA) amend its influential model fire code in a manner disadvantageous to Sessions Tank Liners, Inc. (Sessions), a competitor. Sessions sued Joor for violating the Sherman Act. The district court granted the defendant summary judgment, ruling that the *Noerr-Pennington* doctrine exempted Joor's conduct from antitrust liability. Sessions appeals.

We conclude that legitimate efforts to influence or lobby private, model code associations *are* protected by the *Noerr-Pennington* doctrine. However, we also conclude that "abuses" of the code-promulgating process designed primarily to harm competitors are a "sham" and fall outside *Noerr-Pennington* protection. Because Sessions has stated a very limited "sham" exception claim not considered by the court below, we reverse and remand for further proceedings.

I.

FACTS

Joor manufactures metal tanks used for the underground storage of hazardous fluids, principally gasoline. Sessions repairs leaks in these tanks by puncturing them while still underground and coating their inner surface with an epoxy lining. Removing a tank to repair it aboveground is so costly that customers will ordinarily buy new tanks if this under-

ground lining process is not available. Thus appellant's repairs compete directly with Joor's sales.

According to Sessions, tank lining has been in successful use for some thirty years. In 1980, however, demand for appellant's service began to decline, particularly in California. At the same time, fire department officials in various California localities began denying Sessions the permit necessary to perform its work.

The reason, Sessions alleges, has its source in a proposed amendment to the WFCA's Uniform Fire Code (the Code), a model fire safety code highly influential in the western states.[1] The WFCA is a nonprofit, voluntary membership organization established in 1891. Although it has no official governmental status, the WFCA limits its voting membership exclusively to public officials, most of whom are involved in enforcing fire safety regulations in their respective jurisdictions. The Code has no legal force until local governments choose to adopt or enforce its provisions.

In 1978 the WFCA created a subcommittee to revise Article 79 of the Code, which deals with the use and storage of flammable fluids.[2] One of the Article 79 subcommittee's

[1]The record does not make clear exactly which states, counties or municipalities have enacted the Code into law, or to what extent local legislatures have deviated from its terms when adopting it. According to the WFCA, the Code "has been adopted in a majority of the counties, cities and other political subdivisions in the ten western United States (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah and Washington) and is widely adopted in the thirteen southwestern and mid-western states." Brief of the WFCA et al., amici curiae, at 5. In addition, local fire officials may enforce Code provisions or standards even when their respective localities have not enacted these provisions or standards into law.

[2]The WFCA revises the Code according to the following procedures. An ad hoc subcommittee is established to consider particular issues. Representatives of private industry are often invited to serve thereon. At the time of the events in question, such private industry members had full voting pow-

tasks was to develop safety standards for the underground repair of storage tanks. The alleged safety problem posed by underground repair lies in the possibility that corrosion — which might have caused the leakage — will go undetected. Sessions' epoxy lining stops leaks but does not strengthen the tank walls. Joor insists that aboveground inspection is necessary to ascertain whether the leaking tank's walls can continue to withstand ground pressure.

Joor's president, Howard Robbins, became a member of the Article 79 subcommittee and there argued strenuously that the underground tank lining process should be completely prohibited. On March 17, 1981, at a subcommittee meeting, Robbins moved to amend the Code to require leaking tanks to be removed from the ground. The proposed amendment was calculated to prevent Sessions and similar companies from repairing tanks. Removing a tank from the ground prior to the tank lining process would destroy the cost advantage of that process. Robbins's motion carried unanimously.

Neither Sessions nor any other firm in the tank lining field had a voting representative on the Article 79 subcommittee. However, Sessions was not barred entirely from participating in the subcommittee's deliberations. It was permitted to sub-

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ers within the subcommittee on which they served. (The WFCA has now changed its rules so that private industry representatives no longer have voting power even at the subcommittee level.) If a subcommittee votes to propose an amendment to the Code, the proposal is referred to the WFCA's standing Code Committee, which publishes a notice in two national trade journals and then holds meetings on the proposed amendment. Anyone may attend these hearings, speak and present evidence, but only active WFCA members — no private industry representatives — may vote. After the hearings, both the original proposal and the Code Committee recommendation are again published in the trade journals. Finally, at the WFCA annual conference, where once more anyone may participate but only WFCA members may vote, the entire body of the WFCA approves or rejects the proposed amendment.

mit materials to the subcommittee and to have a representative offer an oral defense of its process at the March 17 meeting. Subsequently, representatives for Sessions and other tank lining companies presented arguments and evidence at the Code Committee meetings and at the WFCA annual conference. Nonetheless, these two bodies both ratified the subcommittee's amendment, which thereby became part of the Code in 1982.

Sessions brought suit under sections 1 and 2 of the Sherman Act, alleging that Joor combined with other tank manufacturing interests to procure an unreasonable restraint of trade, and that Joor was attempting to monopolize the relevant market. Sessions further accused Robbins of making misrepresentations to fire officials inside and outside the WFCA, of conspiring with the same, and of denying Sessions access to the Article 79 subcommittee.

II.

ISSUES

This case requires that we address two issues: (1) Assuming Robbins committed no improprieties in his lobbying efforts, can his successful persuasion of the WFCA constitute an antitrust violation under the Sherman Act? (2) If not, could the alleged improprieties by Robbins nonetheless state an antitrust claim? The first issue concerns the applicability of the *Noerr-Pennington* doctrine, and we find that *Noerr-Pennington* does apply in this context. The second concerns the applicability of that doctrine's "sham" exception, and we find that it too applies in this case, although only in a limited fashion.

III.

ANALYSIS

A. *Applicability of the* Noerr-Pennington *Doctrine*

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), defendants were a consortium of railroad interests that had successfully advocated legislation and executive action harmful to the emerging trucking industry. As here, plaintiff alleged that defendants' campaign had employed misrepresentations and other improper tactics. The first question addressed by the Court, however, was whether the Sherman Act prohibited the railroads' concerted lobbying efforts regardless of any improprieties: whether, that is, the lobbying itself was a "combination . . . in restraint of trade." 15 U.S.C. § 1.

The Court answered in the negative. The Sherman Act regulates "business activity," the Court held, not "political activity." 365 U.S. at 137. The Court supported its conclusion with references to the constitutional right of petition, the value of public input into the political process, and legislative intent. *See id.* at 137-40.

In subsequent cases, the Court has made clear that *Noerr* applied to the petitioning of all governmental bodies. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965). In the case before us, however, the defendant's efforts were directed at a private association serving as a conduit to local legislatures and various governmental agents. If *Noerr-Pennington* does *not* apply here, then Joor could potentially be liable in antitrust simply for bringing to the WFCA's attention true and persuasive information about the safety hazards of a competitor's product — if Joor did so in combination with others or in an attempt to monopolize.

[1] We hold that *Noerr-Pennington* applies. It immunizes proper lobbying — either singly or in combination with others — of a private association engaged in promulgating an important model code to influence legislative and executive decisions.

Our holding rests on the various constitutional, policy and statutory considerations that underlie the *Noerr-Pennington* doctrine. Each of these considerations points clearly to the conclusion that *Noerr-Pennington* applies here.

1. *Constitutional interests.*

Noerr-Pennington exists in large part to protect the constitutional right to petition the government. *Noerr*, 365 U.S. at 138; *see City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 399 (1978). Joor argues that the WFCA is in effect a "governmental" body exercising legislative or quasi-legislative powers. Sessions emphasizes the WFCA's formally private status. The labels "governmental" and "private" are, however, of limited utility.

Petitioning, for constitutional purposes, is not confined to entreating the government directly for relief. *See, e.g., Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 7 (1964)(right to petition courts extended to workers' cooperative plan to advise one another of legal rights). Instead it encompasses appeals to some who are not governmental actors but who are nevertheless involved in the political process. Courts have repeatedly construed *Noerr-Pennington* in this manner.

In *Noerr* itself, an important component of the railroads' strategy was to exert pressure on governmental actors through the medium of public opinion. The Court held that the railroads' "publicity campaign to influence governmental action falls clearly into the category of political activity" shielded from antitrust liability. 365 U.S. at 140-41. We have applied

Noerr-Pennington to an advertising campaign designed to influence a state's voter initiative process. *See Subscription T.V., Inc. v. Southern Cal. Theatre Owners Ass'n*, 576 F.2d 230, 232 (9th Cir. 1978). Finally, attempts to persuade private parties to join in a commercial boycott have also received *Noerr-Pennington* protection where the boycott was part of an effort to procure governmental action. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907, 913-15 (1982); *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301, 1314 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

[2] So too, Joor's efforts, albeit directed at an ostensibly private body, were without doubt part of a plan ultimately to procure favorable legislation. *See Federal Prescription Serv. Inc. v. American Pharmaceutical Ass'n*, 471 F. Supp. 126, 130 (D.D.C. 1979) (Gesell, J.) (efforts to induce private medical associations to adopt favorable position protected under *Noerr* as "indirect attempts to influence governmental behavior"), *aff'd*, 663 F.2d 253, 262 n.6 (D.C. Cir. 1981) (alternative holding), *cert. denied*, 455 U.S. 928 (1982). The WFCA, whether designated as "public," "private," or even "quasi-governmental," plays an important and generally accepted role in the legislative process of the western states. The WFCA's substantial power and the Code's impact on local fire safety laws cannot be denied. For this reason the First Amendment right of petition affords protection to those seeking to influence the WFCA's decisions.

[3] Moreover, the right to petition is not the only First Amendment guarantee on which *Noerr-Pennington* rests. Rights of association are also implicated. *See California Motor Transport*, 404 U.S. at 510; *see also Claiborne*, 458 U.S. at 911 (rights of association and petition are inseparable). Joor was undoubtedly exercising its associational rights when it participated in a private organization to advance its legislative causes, whatever they may have been. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

Thus, First Amendment purposes would be served by extending *Noerr-Pennington* to the circumstances of this case.[3]

2. *Political Process Interests.*

[4] *Noerr-Pennington* also promotes the effective operation of our political processes. *See City of Lafayette*, 435 U.S. at 399; *In re Airport Car Rental Litigation*, 693 F.2d 84, 86 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983). As the Court saw it in *Noerr*, "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." 365 U.S. at 137. Hence the result in *Noerr* was deemed necessary in order not to "deprive the government of a valuable source of information." *Id.* at 139. This concern too is applicable here.

Municipal and other local lawmakers rely on the WFCA's investigatory work in approving or disapproving myriad products and safety standards. In many instances it would be either impossible or inefficient for each local government to do otherwise. Most localities lack both the required resources and the talent. At the same time, it also would be inefficient if not impossible for particular businesses effectively to lobby every city or county council that adopts a fire code. *See Wheeling-Pittsburg Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833, 838 (N.D. Ill. 1983). It follows that the WFCA renders valuable civic services and that the information it receives is quite important in the legislative process.

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[3]By itself, however, this conclusion does not end the inquiry into either *Noerr*'s applicability or Joor's liability. Antitrust law often impinges on First Amendment interests. Boycotts include an associational component, and an agreement to fix prices may of course be speech. Nonetheless, these activities can in certain circumstances be prohibited. The Sherman Act necessarily presupposes that the "right of business entities to 'associate' to suppress competition may be curtailed." *Claiborne*, 458 U.S. at 912; *see National Soc'y. of Prof. Eng'rs v. United States*, 435 U.S. 679, 697 (1978).

Within the WFCA, the various committees and subcommittees depend largely on the input of commercially self-interested parties for the expertise and research necessary to an informed decision. Self-interested information may be biased information, but "it is quite probably people with . . . a hope of personal advantage who provide much of the information upon which governments must act." *Noerr*, 365 U.S. at 139. No one seriously assumes otherwise. The policy interests emphasized in *Noerr-Pennington* require that "free-flowing communication" be encouraged at all levels of governmental decisionmaking. *See Airport Car Rental Litigation*, 693 F.2d at 86. This policy also points in favor of *Noerr-Pennington*'s applicability here.

3. *Statutory considerations.*

Finally, *Noerr-Pennington* rests on sound statutory grounds. To prevail under the Sherman Act, a plaintiff must not only show an unlawful restraint of trade, but also prove that the defendant is legally responsible for this restraint. The Sherman Act was not intended to make private parties liable, in the ordinary case, for governmental acts. Thus where the alleged restraint of trade "was the act of a public official who is not claimed to be a co-conspirator," a private defendant is not ordinarily liable for any damages caused thereby. *Pennington*, 381 U.S. at 671. A leading antitrust treatise has expressed this aspect of *Noerr-Pennington* in terms of "proximate cause":

> private parties may have influenced or persuaded the government to act, but the government's decision to act reflects an independent governmental choice, constituting a supervening "cause" that breaks the link between a private party's request and the plaintiff's injury.

P. Areeda & H. Hovenkamp, *Antitrust Law* 4 (Supp. 1986).[4]

[4] *See also* Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of* Noerr, 74 Geo. L.J. 65, 123 (1985). ("In the

Within our own circuit, Judge Schwarzer has also emphasized this point. *See In re Airport Car Rental Antitrust Litigation*, 521 F. Supp. 568, 574 (N.D. Cal. 1981) ("if plaintiff suffered injury, it resulted from the acts of public officials . . . not the joint action of defendants"), *aff'd*, 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983).

[5] These considerations apply here. The Article 79 amendment as initially proposed by Joor's president and later accepted by the entire WFCA had no legal force and little injurious effect until it was adopted by local legislatures or enforced by local fire officials. Absent improprieties in the lobbying process, the acts of these governmental officials should not make Joor liable to Sessions under the Sherman Act. *See Noerr*, 365 U.S. at 135-36 (lobbying not actionable under Sherman Act because private parties not responsible for governmental restraints of trade).

For all the foregoing reasons, we conclude that *Noerr-Pennington* applies to Joor's lobbying efforts within the WFCA.

B. *Applicability of* Noerr-Pennington's *"Sham" Exceptions*

Sessions alternatively contends that Joor's conduct fell within the "sham" exception to the *Noerr-Pennington* doctrine. Robbins, Sessions alleges, deprived Sessions of meaningful access to the Article 79 subcommittee, conspired with various public fire officials, and misrepresented facts both inside and outside the WFCA. The crucial question, as we see it, is whether these asserted improprieties amounted to an "abuse of process," *Clipper Exxpress v. Rocky Mtn. Mot. Tariff Bur., Inc.*, 690 F.2d 1240, 1259 (9th Cir. 1982), *cert.*

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absence of egregious conduct, a governmental decision favorable to the petitioner will negate the proximate causation of any competitive injury.").

denied, 459 U.S. 1227 (1983); *Rodgers v. FTC*, 492 F.2d 228, 232 n.6 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974), corrupting the WFCA's decision. Before turning to each of appellant's allegations concerning Joor's abuse of the WFCA's process, a recent decision of the Second Circuit must be considered.[5]

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[5]We must also dispose of a preliminary objection. Joor succeeded in its efforts to amend the Code and thus local fire safety laws. It claims, therefore, that its petitioning was "genuine" and cannot be called a "sham." Not so.

To be sure, the clearest examples of sham petitioning are those in which the defendant's aim was to harm a competitor directly, not through the governmental process that he purported to invoke. *See, e.g., Energy Conservation, Inc. v. Heliodyne*, 698 F.2d 386, 389 (9th Cir. 1983) (baseless lawsuit allegedly designed to cause competitor expense and to generate adverse publicity). Perhaps because the term "sham" suggests this sort of situation, courts have sometimes asserted the mistaken proposition for which Joor contends. *See, e.g., WIXT Television, Inc. v. Meredith Corp.*, 506 F. Supp. 1003, 1032 (N.D.N.Y. 1980) ("by definition a successful claim cannot be 'sham' ").

But there are other instances of sham petitioning in which the defendant genuinely seeks to achieve his governmental result, but does so *through improper means*. *See, e.g., Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 993-94 (9th Cir. 1979), (infringement suit based on fraudulently obtained patent is in "bad faith" and thus actionable in antitrust despite *Noerr*), *cert. denied*, 444 U.S. 1025 (1980); *Israel v. Baxter Labs., Inc.*, 466 F.2d 272, 278-79 (D.C. Cir. 1972) (misrepresentations inducing decision by administrative tribunal are actionable); *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 179 & n.19 (D. Del. 1979). In such cases, the defendant may well succeed in procuring the desired governmental action, but has nonetheless misused his petitioning privilege. Thus defendant's "success or failure" is "one indicator" of whether his petitioning was a sham, *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 903 (9th Cir. 1983), but it is not dispositive.

Commentators occasionally urge courts to use the word "sham" only when referring to disingenuous — rather than unethical — petitioning. But in both cases there is a pretense of seeking an independent, impartial decision. Thus both may fairly be called shams. *See* Hurwitz, *supra* note 4, at 109.

1. *The Second Circuit case.*

The Second Circuit recently held *Noerr-Pennington* inapplicable in a case involving a model code association much like the WFCA. *See Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938, 943 (2d Cir. 1987). Superficially, *Indian Head* is contrary to our resolution of the first issue. In fact, however, our difference with the Second Circuit is not so deep as it might appear.

In *Indian Head*, defendant enrolled over 150 new members — most of whom were defendant's employees or agents — into the association and thereby won a pivotal vote by a slim majority. *Id.* at 940-41. The court found that *Noerr-Pennington* did not protect such conduct. We agree with this result; we do not agree, however, that the *Noerr-Pennington* doctrine is generally inapplicable to "model code association" cases.

[6] The essential flaw in the Second Circuit's analysis, as we see it, is that the court conflated the question of whether *Noerr-Pennington* applied with the distinct question of whether its "sham" exception was also applicable:

> Simply put, [defendant's] conduct did not constitute petitioning of the government within the meaning of *Noerr-Pennington*: rather, its conduct was a subversion of the legitimate purposes of the [model code association].

Indian Head, 817 F.2d at 945. Although we think the Second Circuit correctly denied immunity in *Indian Head*, the proper analysis of such "subversion" should focus on the applicability of *Noerr-Pennington*'s exceptions.

In saying this we recognize that the court in *Indian Head*, by restricting *Noerr-Pennington* to direct petitioning of the government, simplified the law by reducing drastically the

scope of the "sham" exception. On the other hand, it complicated the law by requiring that the antitrust law develop the permissible practices of model code associations, their members, and participating non-members. It is unlikely that this exchange will result in a net simplification.[6]

2. *Exclusion from the Article 79 Subcommittee.*

[7] Sessions argues that it was denied meaningful access to the WFCA because it had no voting representative on the Article 79 subcommittee. Although denial of access to a decisionmaking tribunal can provide grounds for a "sham" exception claim, *see California Motor Transport*, 404 U.S. at 511-12, there can be no such claim here. Even if Sessions had a valid claim based on exclusion from the subcommittee, it has offered no evidence that Joor, rather than the WFCA, was responsible for this exclusion.

3. *Conspiracy.*

Antitrust immunity under *Noerr-Pennington* does not extend to private parties who have entered into a "conspiracy" with governmental actors. *See Clipper Exx-*

[6]A few other observations with respect to the *Indian Head* case may be helpful. The Second Circuit stressed that private bodies, unlike governmental actors, cannot be assumed to be acting in the public interest. *See* 817 F.2d at 943-44. True or not, this point overemphasizes the policy aspect of the *Noerr* doctrine at the expense of its other components. The court gave short shrift to antitrust defendants' petitioning rights in situations where they had not "subverted" the organization's code-promulgating process, and it made no mention at all of their associational rights, which are plainly implicated. More troubling still, the court held that defendant could not try to justify the organization's failure to approve plaintiff's product (which formed the basis of the lawsuit) by showing that plaintiff's product was in fact unsafe: "The 'objective validity' of a restraint of trade has never been a defense to an antitrust charge . . . ." *Id.* at 947. Thus *Indian Head* in effect suggests that defendants may owe treble damages simply for bringing forward undisputed evidence that a rival's product is actually hazardous. The *Noerr* doctrine exists precisely to prohibit such a result.

press, 690 F.2d at 1252 n.17; *Harman v. Valley Nat'l Bank*, 339 F.2d 564, 566 (9th Cir. 1964); P. Areeda & H. Hovenkamp, *Antitrust Law* 20-25 (Supp. 1986). Sessions introduced evidence below showing that Joor routinely entertained WFCA members and other local fire officials and provided them with certain "promotional gifts" such as coffee mugs and tape measures. The district court concluded, however, that this evidence failed to raise a triable issue of conspiracy. We agree.

Joor's efforts to curry favor with WFCA members may have been somewhat indelicate, but they provide no evidence of any unlawful agreement. *See Metro Cable Co. v. CATV, Inc.*, 516 F.2d 220, 230-31 (7th Cir. 1975) (on motion to dismiss) (allegations of campaign contributions, even if true, do not provide basis to withhold *Noerr-Pennington* immunity). Sessions, it develops, has offered no "specific factual support of the allegations of conspiracy," which this court requires for summary judgment purposes. *See Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 672 (9th Cir. 1980).

We must acknowledge, however, that the fact that Robbins sat on the very subcommittee that launched the amendment so favorable to Joor is unsettling. The spectre raised by this circumstance is that a body ostensibly devoted to the public good — and possessed of considerable power because of this reputation — may have been "captured" by particular private interests. *See generally* Wiley, *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713 (1986). Private standards-setting associations are particularly vulnerable to this sort of abuse. *See American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982). In essence this was the situation in *Indian Head*, where certain steel interests "took over" the model code association on the eve of a critical vote by enrolling hundreds of new members drawn from their own ranks. Such conduct constitutes exactly the kind of abuse of process that the "sham" exception to *Noerr-Pennington* serves to weed out.

[8] Despite the fact that Robbins's position on the Article 79 subcommittee creates an appearance of impropriety, Sessions has not made a sufficient showing that Joor or other tank manufacturing interests combined to capture the WFCA. Sessions has not alleged that anyone on the subcommittee other than Robbins had a financial interest in the proposed amendment. Nor has Sessions offered evidence that Robbins in fact exerted an improper influence over any WFCA members or exercised improper control over WFCA procedures or voting. The entire WFCA membership, consisting exclusively of public officials, had final authority to accept or reject the proposed amendment, and Sessions has provided us with no reason to doubt their integrity.[7]

4. *Misrepresentation.*

The gravamen of Sessions's accusations of impropriety is that Joor persuaded the WFCA by the use of deceptive material. In particular, Sessions challenges a letter that Robbins submitted to the Article 79 subcommittee in which he summarized his objections to the underground tank lining process. Robbins wrote that:

> [T]wo certainties exist:
>
> 1. When leakage is encountered, weakened metal exists, and,

[7]If the WFCA were an association of private interests putatively engaged in self-regulation, Sessions would have a very different antitrust claim. Joor's liability would probably not be altered, but the WFCA as a whole might then be subject to suit. *Cf. United States v. National Soc'y of Professional Eng'rs*, 435 U.S. 679 (1978) (engineers' association was liable in antitrust for taking position that competitive bidding was unethical); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (allegations that gas producers' and sellers' association had with anticompetitive intent refused to approve and to service plaintiff's product stated antitrust claim). But Sessions has not sued the WFCA as a whole, nor impugned the integrity of its ultimate decisionmaking process.

2. It is difficult to ascertain remaining metal thickness from an observation point inside the tank.

Acceptance of tank lining, as is being proposed, implies the discarding of UL 58 or equivalent strength requirements.

E.R. at 702-03.

According to Sessions, all three of these representations were false. First, there may be no weakness in the metal of a leaking tank. Second, ultrasonic testing can accurately measure the thickness of the tank walls while the tank is still underground. Finally (still according to Sessions), Robbins's conclusion falsely suggests that tank lining somehow repudiates or voids the tank's UL label of approval.[8] The UL label indicates only that the tank in its original condition satisfied certain wall thickness specifications, and lining a used tank has no effect on its continuing ability to satisfy those requirements. Sessions later procured a letter from UL confirming this position. *See* E.R. at 309.

[9] The district court concluded, however, that Robbins's statements were not deceptive, but "simply part of a reasoned argument." E.R. at 703. The district court said that "Joor may have been wrong, [but] it is clear that the WFCA could not have been misled by what Joor said." *Id.*

[10] It is possible that the district court's conclusion was, for summary judgment purposes, erroneous. If Robbins were "wrong" in his letter, the Article 79 subcommittee may well have been misled. And there is evidence that it was. The min-

[8]UL — short for Underwriters Laboratories — is a private, nonprofit corporation that establishes standards and specifications for products in a wide variety of industries. The UL label on a product indicates that it meets the relevant standards. The parties agree, and the district court found, that UL approval "is essential to the successful marketing of a product." E.R. at 695.

utes from the meeting at which the subcommittee voted to accept Joor's amendment reflect an acceptance of the erroneous idea described above: "The committee was unanimous in their disapproval of cutting an opening in a tank *and thus destroying the integrity of the UL approval* to proceed with the lining process." E.R. at 580 (emphasis added).

Misrepresentations, however, do not necessarily destroy *Noerr-Pennington* immunity. An antitrust plaintiff cannot summon the "sham" exception by alleging that defendant made misrepresentations when pursuing legislative — as opposed to adjudicative — action. *Clipper Exxpress*, 690 F.2d at 1261; *see California Motor Transport*, 404 U.S. at 513; *First Am. Title Co. v. South Dakota Land Title Ass'n*, 714 F.2d 1439, 1447 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042; *Metro Cable*, 516 F.2d at 228 (7th Cir. 1975).

[11] Sessions, however, argues that the WFCA is not a legislative body. Perhaps so, but it was legislative action that both Sessions and Joor sought. Moreover, the WFCA was an indispensable part of the "political arena." *California Motor Transport*, 404 U.S. at 513. In *Noerr* the Court refused to hold that alleged misrepresentations in a publicity campaign designed to influence legislation were actionable under the Sherman Act. Such conduct fell "clearly into the category of political activity." 365 U.S. at 140-41. That principle controls this case.

[12] Although the issue is a close one, we hold that that principle does not extend to Joor's alleged misrepresentations made *outside* the WFCA lobbying process, *before* the Code was amended, to local fire officials who thereafter denied Sessions the requisite permits for carrying on its work. The record suggests that these officials were induced to believe that tank lining would "void" the UL label or that tank lining was already prohibited by the Code. *See* E.R. at 232-33. In one case at least, Sessions claims to have evidence that it was

Robbins himself who persuaded officials to deny Sessions a permit. *See* E.R. at 660.

[13] Misrepresentations made to an executive official fall between the clear rules established in the legislative context (where misrepresentations are *not* actionable) and the adjudicative context (where they *are* actionable). *See* P. Areeda & H. Hovenkamp, *Antitrust Law* 44 (Supp. 1986). Application of these distinctions is not easy. Executive officials may administer the law, adjudicate claims under the law, or, by framing policy, make law. The lines between the executive, legislative, and judicial function are often quite indistinct. Careful case-by-case analysis is necessary. Where the executive action sought was more a matter of *administering* than of *making* law, misrepresentations inducing the governmental decision will be actionable in antitrust despite the *Noerr-Pennington* doctrine. *C.f., e.g., Woods Exploration & Producing Co. v. Aluminum Co.*, 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (misrepresentations before state natural gas commission inducing decision under set allocation formulae held unprotected by *Noerr*); *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 178 (D. Del. 1979).[9]

[9] In *Noerr* itself, defendants had allegedly made misrepresentations to induce executive action. *See* 365 U.S. at 129-30. Defendants apparently sought an executive decision to enforce existing law *more strictly*. *See id.* at 131. That is the kind of policy decision our analysis would probably exclude from the reach of the "sham" exception. In any event, a more recent Supreme Court opinion has clearly established that a person's petitioning immunity does not protect him from at least some deliberate misrepresentations made in pursuit of executive action. *See McDonald v. Smith*, 472 U.S. 479, 484 (1984) (letter sent to president defaming plaintiff, a nominee for United States attorney, was not immunized by defendant's right of petition and was actionable in libel). Because such misrepresentations also fail to serve *Noerr*'s policy or statutory interests, we see no reason to immunize them in antitrust if they are not to be immune in libel. *See* Hurwitz, *supra* note 4 at 83-84; *see also McDonald*, 472 U.S. at 484 (citing antitrust precedent in support of its holding).

[14] Here, if Sessions's allegations are true, the fire officials were asked to respond in an administrative capacity. These officials were asked to deny Sessions its permit either because tank lining violated UL standards or because it violated the Code. This would be a clear instance of administering extant, established standards. We hold that these allegations state a limited "sham" exception claim. To succeed, Sessions must show that Joor's misrepresentations — and not any independent factors — caused the fire officials to act. In addition, it must prove all the other elements of a Sherman Act violation before it is entitled to antitrust damages.

The cause of action left to Sessions is a narrow one. Any misrepresentations made by Joor in pursuit of its legislative goals are fully protected under *Noerr-Pennington*. In addition, any injury to Sessions caused by the actual amendment to the Code — whether through governmental or private action in reliance thereon — provides no basis for an antitrust action against Joor. To this extent we fully affirm the summary judgment granted below. We reverse and remand only in order that Sessions be allowed to prove, if it can, injury caused by Joor's misrepresentations to fire officials in their administrative capacity.[10]

AFFIRMED in part; REVERSED and REMANDED in part.

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[10]Sessions may of course also attempt to prove that Robbins made misrepresentations to *private* parties not in pursuit of its governmental aims, but rather to harm the tank lining industry directly. The antitrust actionability of such conduct — regardless of Robbins' position on the Article 79 subcommittee — was established in *American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982). Sessions may also proceed with its state law claims, which were not involved in this appeal.

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SESSIONS TANK LINERS, INC. v. JOOR MANUFACTURING, INC.

Cite as 1986-1 Trade Cas. (CCH) ¶ 66, 989 (C.D. Cal. 1986)

U.S. District Court, Central District of California. Case No. CV 84-6363 MRP. Filed January 17, 1986.

Sherman Act

Inducing Governmental Action—Storage Tank Safety Standards—Lobbying of Private Organizations—Adoption of Standards by Governmental Entities.—An underground storage tank manufacturer's successful lobbying of private, standards-setting organizations to eliminate, as an alternative to the replacement of leaking tanks with new ones, the process of lining the tanks while in their original underground locations was protected by the *Noerr-Pennington* right to induce governmental action. Although these organizations were private, rather than governmental, numerous state and local authorities had adopted their standards and had, in effect, delegated governmental authority to them. As indicated by the manufacturer's allegations, the lobbying of the private organizations brought about its injuries precisely because, and only to the extent that, their standards were adopted by the governmental entities. No sham exception to *Noerr-Pennington* protection existed because of the manufacturer's alleged misrepresentations before the organizations. In context, its statements regarding storage tank structural strength were not false or deceptive, and the tank lining company was not foreclosed from presenting its views before the organizations. Moreover, the co-conspirator exception to *Noerr-Pennington* was not applicable. Some evidence of nominal gifts from the manufacturer to organization members and correspondence between them failed to

raise an issue of triable fact as to any conspiracy between them to restrain trade.

See ¶ 1640.

Memorandum of Decision and Order Granting Summary Judgment

PFAELZER, D.J.: Defendant's Motion for Summary Judgment came on for hearing on June 24, 1985 before the Honorable Mariana R. Pfaelzer. The Court, having considered the papers filed and oral arguments made, grants defendant's Motion for Summary Judgment.

I. *Background*

Plaintiff Sessions Tank Liners, Inc., d/b/a/ Southwest Tank Liners, Inc. ("Southwest") is a California corporation engaged in the business of lining underground storage tanks used to store hazardous or volatile materials such as gasoline. Tank lining is the process by which storage tanks that have developed leaks are lined while still in their original underground location. Defendant Joor Manufacturing, Inc. ("Joor"), a California corporation, manufactures and sells underground storage tanks.

Plaintiff alleges that defendant conspired to restrain competition by forcing customers who had leaking storage tanks to purchase replacement tanks from defendant rather than lining goods and services from Southwest. The complaint alleges that this was accomplished through a "campaign of dissemination of false information and other deceptive and coercive tactics" designed to convince legislative bodies to pass statutes that would have the practical effect of prohibiting tank lining.

Plaintiff alleges that this was largely accomplished through defendant's membership in, and dealings with,

the Article 79 Subcommittee ("the Subcommittee") of the Western Fire Chiefs Association ("the WFCA"). The WFCA is a non-profit voluntary membership organization. It attempts to protect life and property from harm by fire by developing, publishing and disseminating the Uniform Fire Code ("the UFC"). The UFC sets forth recommended safety standards.

The WFCA has a number of specialized committees which review the UFC and propose changes. These committees are composed of interested parties from private industry and public fire safety officials. Committee proposals are submitted to the WFCA voting members. Only public fire officials may be WFCA voting members. When approved, committee proposals become part of the UFC. State and local authorities often rely on the UFC and frequently these standards are incorporated into state or municipal codes.

Underwriters Laboratories ("UL") is a private corporation which provides two relevant services. First, it develops a set of specifications called a "product standard" for new products. This product standard is industry wide and each competitor's product is measured by this objective standard. Second, UL tests products to determine safety. If UL finds that a manufacturer's product is safe, it permits the manufacturer to attach a UL "label" to that product and will "list" that manufacturer as an approved manufacturer of the particular product. Being listed, or having a label, is essential to the successful marketing of a product.

Plaintiff contends that as a result of defendant's conspiracy, the WFCA amended the UFC to prohibit tank lining as practiced by Southwest. Plaintiff further contends that as a result of this conspiracy, UL developed new standards which create the impression that only

removal and replacement of leaking tanks, rather than lining, can satisfy the UL's standards.

The complaint is in eight counts: (1) restraint of trade in violation of § 1 of the Sherman Act; (2) restraint of trade in violation of § 2 of the Sherman Act; (3) restraint of trade in violation of the Cartwright Act, California Business & Professions Code § 16,700 *et seq.*; (4) unfair competition in violation of Cal. Business & Professions Code § 17,200; (5) tortious interference with contractual relations; (6) tortious interference with prospective advantage; (7) trade libel and disparagement; and (8) defamation. Counts 3-8 are pendent to the federal antitrust claims set out in Counts 1 and 2. Joor has moved for summary judgment as to Counts 1 and 2 and for dismissal of the pendent state claims.

II. *Discussion*

In its Motion for Summary Judgment, Joor takes the position that it merely engaged in good faith lobbying of the WFCA and UL, both of which it describes as quasi-governmental agencies. Joor argues that under the *Noerr-Pennington* doctrine, bona fide attempts to influence legislative bodies are immune from antitrust scrutiny, regardless of the anti-competitive purpose that prompts such attempts. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* [1961 TRADE CASES ¶ 69,927], 365 U.S. 127 (1961); *United Mine Workers v. Pennington* [1965 TRADE CASES ¶ 71,462], 381 U.S. 657 (1965). The doctrine also extends to attempts to influence administrative and judicial bodies. *California Motor Transport Co. v. Trucking Unlimited* [1972 TRADE CASES ¶ 73,795], 404 U.S. 508, 510-511 (1972).

Southwest contends that *Noerr-Pennington* is inapplicable for three reasons: (1) defendant's lobbying

efforts were directed to a private association, not a governmental entity, and therefore do not qualify for *Noerr-Pennington* protection; (2) defendant's dissemination of fraudulent information to governmental entities is not protected under *Noerr-Pennington* (the sham exception); and (3) the complaint alleges sufficient facts to satisfy the "co-conspirator" exception to *Noerr-Pennington*.

A. *Lobbying Governmental Entities*

Numerous state and local authorities have adopted the standards set out by the WFCA in its UFC, and have relied on testing procedures of independent laboratories such as UL, in promulgating their tank lining requirements. Such reliance upon the WFCA and UL by these governmental authorities in practical effect has resulted in a delegation of governmental authority to these otherwise private entities. While governmental bodies have retained the power to modify or reject the WFCA and UL recommendations, in practice, it appears that they have accepted and relied on them.

Southwest itself has recognized this to be the case. First, the essence of plaintiff's antitrust claim is that if the WFCA or UL refused to approve a practice, the governmental entities relying on WFCA and UL would necessarily also refuse to approve the practice. Second, as a practical matter, it would be virtually impossible for Joor to lobby the individual governmental entities regarding the adoption of particular specifications or requirements in the UFC. These governmental bodies rely on the WFCA and UL and in order to have any effective influence on the government entities, Joor was required to lobby the WFCA and UL.

In *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.* [1983-2 TRADE CASES ¶ 65,525], 573

F. Supp. 833 (N.D. Ill. 1983), the court held that defendants' lobbying of UL and the National Fire Protection Association ("the NFPA"), an independent, code-promulgating organization similar to the WFCA, was entitled to *Noerr-Pennington* protection. The court noted that numerous states and municipalities had adopted the public safety standards set out by the NFPA in its model electrical code, and had relied on the testing procedures of laboratories such as UL in promulgating their electrical code requirements. Such reliance, the court found, resulted in a "near complete delegation of governmental authority to these otherwise private entities" in that in order to influence the governmental entities, defendants had no choice but to approach UL and NFPA. *Id.* at 838.

Similarly, in *Rush-Hampton Industries v. Home Ventilating Inst.* [1976-2 TRADE CASES ¶ 61,107], 419 F. Supp. 19 (M.D. Fla. 1976), the court found that *Noerr-Pennington* applied to lobbying of organizations promulgating building codes where approved standards were often incorporated by reference into state and local building codes. The plaintiff was engaged in the manufacture, distribution and sale of ductless bathroom fans. The defendant was a trade association composed of businesses manufacturing and/or selling ductless bathroom fans. The plaintiff sought approval for its new product, ductless fans, from the three regional building code organizations whose primary functions were to promulgate model building codes and building standards for use by state and local entities. The defendant trade association was alleged to have organized and financed opposition to the plaintiff's new product by opposing the plaintiff's applications before the building code organizations, in violation of the antitrust laws. The court found that the approval by one of the building

code organizations was "tantamount to approval by numerous governmental entities . . . as the standards and products are often adopted by reference from those standards and products already reviewed by the organization." [1976-2 TRADE CASES ¶ 61,107], 419 F. Supp. at 22. The court held that the *Noerr-Pennington* doctrine protected the statements made by defendants to the building code organizations.

Moreover, *Noerr-Pennington* protection should not be refused because this Court is unable to evaluate the precise extent to which governmental bodies have adopted UL and WFCA standards. As indicated by plaintiff's own allegations, defendant's lobbying of the WFCA and UL brought about plaintiff's injuries precisely because, and only to the extent that, the recommendations made by those organizations were actually adopted by the governmental entities. Accordingly, the Court finds that the defendant's lobbying of the WFCA and UL is immunized from antitrust scrutiny under *Noerr-Pennington*.

B. *The Sham Exception*

Southwest argues that even if the *Noerr-Pennington* doctrine is extended to include Joor's activities with regard to WFCA and UL, Joor's "lobbying" was merely a sham designed to force the WFCA to adopt an unreasonably restrictive code. In *Noerr*, the Supreme Court held that there are some instances where the alleged conspiracy "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." [1961 TRADE CASES ¶ 69,927] 365 U.S. at 144. Southwest argues that the sham exception to the *Noerr-Pennington* doctrine is applicable here.

This sham exception was the basis for the Supreme Court's decision in *California Motor Transport, supra.* There, the activity which came within the sham exception **was the defendants' opposition to every application made by plaintiffs to the California Public Utilities Commission** and the Interstate Commerce Commission regardless of the merits of the application. The alleged result "was that the machinery of the agencies and courts was effectively closed" to the plaintiffs. [1972 TRADE CASES ¶ 73,795] 404 U.S. at 511. *California Motor Transport* distinguishes between those concerted efforts which are genuinely directed at influencing public officials and those efforts which are intended to bar competitors from access to adjudicatory tribunals.

To meet the sham exception, there must be: (1) "some clearly established pattern of misrepresentation"; or (2) "initiation of baseless legal proceedings, or of covert pressures and tactics designed to deprive the administrative body of its ability to function independently . . ." *Rush-Hampton, supra,* at 24. The second test is really a test of the availability of equal access to the decision-making body so as to permit an opponent to urge his position in a meaningful way. "[A] defendant's lobbying activities may not be designed to deprive the opponent of access to the decision-making process." *Wheeling-Pittsburgh Steel, supra* at 842.

Southwest claims that the sham exception applies because: (1) a Joor representative wrote a letter to members of the Subcommittee attacking tank lining which contained false and decep tive statements; and (2) Southwest was not permitted meaningful participation in the deliberations of the Article 79 subcommittee.

1 ***Southwest Has Not Established a Pattern of Misrepresentation by Joor to the WFCA and UL***

In his letter of March 3, 1981 to the Subcommittee, Robbins, the president of Joor, wrote that:

> Although there is some continuing discussion vis-a-vis external vs internal corrosion, two certainties exist:
>
> 1. When leakage is encountered, weakened metal exists, and,
>
> 2. It is difficult to ascertain remaining metal thickness from an observation point inside the tank.
>
> Acceptance of tank lining, as is being proposed, implies the discarding of the UL 58 or equivalent strength requirements.

See Declaration of G. Robert Meachem, Exhibit 4. Southwest claims that Robbins' statement that "when leakage is encountered, weakened metal exists, and . . . it is difficult to ascertain remaining metal thickness from an observation point inside the tank" implies a significant *structural* weakening of the storage vessel. See Declaration of G. Robert Meacham, at p. 7. Southwest also claims that Robbins' statement that if tank lining is accepted as currently proposed, it would imply the "discarding of UL 58 or equivalent strength requirements" falsely suggests that cutting a tank would void the UL label. See Declaration of G. Robert Meacham, at p. 8. These two statements are the only purportedly false and deceptive statements offered by Southwest to prove a pattern of misrepresentaton before the quasi-public bodies lobbied by Joor.

The Court does not find that the statements made in the letter in question were false and deceptive. After having read the statements in context, the Court is

convinced that they are simply part of a reasoned argument presented to the WFCA by Joor and that, while plaintiff may disagree with the position taken by Joor, there is no misrepresentation in the letter. All Joor states is that UL 58 was designed to establish a standard for minimum structural strengths of underground steel tanks as well as the equivalency standard for tanks made of other materials and that no deviation from or degradation of this standard of structual capability is permitted. Joor then says that product leakage is usually evidence that the steel has been reduced in thickness and therefore weakened. However, Joor continues, it is difficult to tell from inside the tank how significant the degradation of the structural integrity of the tank is and no test exists for this purpose. It is Joor's conclusion therefore that the only way to insure that UL 58 strength requirements are maintained is to replace the leaking tank, not to line it.

That is a fair reading of the disputed language of the letter and, while Joor may have been wrong, it is clear that the WFCA could not have been misled by what Joor said. Joor is entitled to advocate its position just as plaintiff is. Clearly, there is no disputed issue of material fact as to Joor's submitting false and misleading statements to either the WFCA or the UL.

2. *Joor Did Not Deprive Southwest of Access to the Decision-Making Body*

Southwest also claims that a factual issue exists as to "whether the denial of access to the Article 79 subcommittee and its activities reflects a denial of due process and anti-competitive acts." *Southwest's Opposition*, at 15-16. There is no evidence that Southwest was denied access to the Subcommittee. In his deposition, Sessions, the President of Southwest,

stated that he did attend a subcommittee meeting on October 14, 1980. *Joor Memo in Support of Summary Judgment Motion*, at Tab 16. Mr. Sessions also stated that he distributed materials to the Subcommittee with specifications for the lining of tanks. *Id.*, at Tab 17. Furthermore, at a March 17, 1981 meeting of the Article 79 subcommittee, according to Mr. Sessions, Mr. Paul Meli of Bridgeport Chemical Co. spoke on behalf of both Bridgeport and Southwest. *Id.*, at Tab 18.

Plaintiff nevertheless condends that it was denied effective access because it could not gain membership as a voting member of the Subcommittee until 1982. It requested this right in 1980. Joor maintained such a right throughout. This claim of denial of effective access does not meet the sham exception for two reasons. First, the subcommittee was not a quasi-legislative body; it was only an advisory body. Neither Joor nor Southwest ever had a right to participate in the code promulgating body's (the WFCA's) deliberations and voting. Second, and more importantly, membership, or denial of membership on a subcommittee of a code promulgating body is not the type of denial of access to which the sham exception is directed. As stated above, it is activities which have the effect of freezing opponents out of the decision-making process which have concerned courts. Here, the Subcommittee remained open to the plaintiff and plaintiff clearly had an opportunity to be heard. Accordingly, the Court finds that plaintiff was not denied effective access to the relevant decision-making body.

C. *The Co-Conspirator Exception to Noerr-Pennington Does Not Apply*

Plaintiff argues that summary judgment is improper because the allegations of the complaint state a claim under the co-conspirator exception to the *Noerr-*

Pennington doctrine. In the Ninth Circuit, *Noerr-Pennington* does not obtain when a member of a legislative body or other public official actively participates in a larger conspiracy to restrain trade. *Harman v. Valley National Bank of Arizona* [1968 TRADE CASES ¶ 72,497], 339 F.2d 564 (9th Cir. 1964).

The Court finds that plaintiff has not raised an issue of triable fact as to the co-conspirator exception. Plaintiff offers only (1) some evidence of nominal gifts to committee members; and (2) certain correspondence between employees of Joor and WFCA members. Having considered the contents of these letters, the Court concludes that they do not evidence any concerted action to restrain trade. As to the nominal gifts, these fail to prove improper influence, or any sort of conspiracy at all. Accordingly, the co-conspirator exception to *Noerr-Pennington* does not apply.

D. *Counts 3-8*

Counts 3-8 allege various violations of state law. Southwest asks this Court to assume pendent jurisdiction over these claims. However, since the substantial federal antitrust claim must be dismissed, the Court in its discretion dismisses Southwest's state law claims for lack of subject matter jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

III. It Is Therefore Ordered that:

1. Defendant's Motion for Summary Judgment on Counts I and II is granted.

2. Counts 3-8 of the Complaint are dismissed for lack of subject matter jurisdiction.

INDIAN HEAD, INC. v. ALLIED TUBE & CONDUIT CORP.

Cite as 817 F.2d 938 (2nd Cir. 1987)

INDIAN HEAD, INC.,
Plaintiff-Appellant,
Cross-Appellee,

v.

ALLIED TUBE & CONDUIT CORPORATION,
Defendant-Appellee,
Cross-Appellant.

Nos. 534, 735, Dockets 86-7734
and 86-7758

United States Court of Appeals,
Second Circuit

Argued Jan. 20, 1987.
Decided April 22, 1987.

Manufacturer of polyvinyl chloride electrical conduits brought antitrust action against manufacturer of steel electrical conduits, alleging that steel conduit manufacturer conspired to prevent inclusion of polyvinyl chloride conduit in industry standards. The United States District Court for the Southern District of New York, John E. Sprizzo, J., entered judgment notwithstanding verdict in favor of steel conduit manufacturer, and polyvinyl chloride conduit manufacturer appealed. The Court of Appeals, Lumbard, Circuit Judge, held that: (1) activities of steel conduit manufacturer in attempting to influence

private electrical standard-setting organization with respect to proposal to include polyvinyl chloride conduit in industry standards was not protected from Sherman Act scrutiny under the *Noerr-Pennington* doctrine, which protected petitioning of government, and (2) steel conduit manufacturer's activities could be found to violate Sherman Act, notwithstanding its literal compliance with organization's rules and existence of objective scientific evidence supporting exclusion of polyvinyl chloride conduit.

Vacated and remanded with directions.

1. Monopolies ##* 12(16.5)

Steel electrical conduit manufacturer's attempts to influence private electrical standard-setting organization, with respect to proposal to include polyvinyl chloride electric conduit in industry standards, were not protected from Sherman Act scrutiny under the *Noerr-Pennington* doctrine, which protected petitioning of government from such scrutiny, though governments routinely incorporated organization's standards into their legal codes; declining to follow *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F.Supp. 833 (N.D.Ill.); *Rush-Hampton Industries v. Home Ventilating Institute*, 419 F.Supp. 19 (M.D.Fla.); declining to extend *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464; *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

*Keynote symbol represented by "##".

2. Monopolies ## 12(18)

Steel electrical conduit manufacturer's packing annual meeting of electrical standard-setting organization with newly registered members, whom it subsidized, for sole purpose of excluding polyvinyl chloride electrical conduit from organization's standards, and consequently from marketplace, could be determined to violate Sherman Act, notwithstanding manufacturer's literal compliance with organization's rules and existence of objective scientific evidence supporting exclusion. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Fredric W. Yerman, New York City (Kaye Scholer, Fierman, Hays & Handler, New York City, Michael Malina, Ira S. Sacks, Randolph S. Sherman, Richard A. De Sevo, Bert L. Slonim, Donna M. Gerber, of counsel), for plaintiff-appellant, cross-appellee Indian Head, Inc.

Frank H. Wright, New York City (Grand & Ostrow, New York City, Allison Manning, Michael D. Rips; Lison & Barrett, Chicago, Ill., John M. Lison, of counsel), for defendant-appellee, cross-appellant Allied Tube & Conduit Corp.

Robert D. Paul, General Counsel, Federal Trade Com'n, Washington, D.C. (Ernest J. Isenstadt, Asst. Gen. Counsel, Dean C. Graybill, Michael Goldenberg, Attorneys, Federal Trade Com'n, Washington, D.C., of counsel), as amicus curiae.

Douglas H. Ginsburg, Asst. Atty. Gen., Dept. of Justice, Washington, D.C. (W. Stephen Cannon, Deputy Asst. Atty. Gen., Catherine G. O'Sullivan, Marion L. Jetton, Attorneys, Dept. of Justice, Washington, D.C., of counsel), as amicus curiae.

Before LUMBARD, KEARSE and PRATT, Circuit Judges.

LUMBARD, Circuit Judge:

This case requires us to decide whether federal antitrust laws apply to attempts to influence the promulgation of a code of safety standards by private industry. In its complaint, plaintiff Indian Head, Inc. (Carlon) charged that defendant Allied Tube & Conduit Corp. had conspired to prevent inclusion of Carlon's product in industry standards. The jury found for Carlon, and awarded it $3.8 million in damages (before trebling). Carlon now appeals from a judgment for defendant, notwithstanding the jury verdict, entered by Judge John E. Sprizzo in the Southern District on July 31, 1986. Judge Sprizzo reasoned that the doctrine developed in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.8. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), which protects petitioning of the government from Sherman Act scrutiny, also protects attempts to influence a private standard-setting organization where, as here, governments routinely incorporate that organization's standards into their legal codes. Allied cross-appeals, claiming that, as a matter of law, its conduct did not constitute an unreasonable restraint of trade. We vacate the judgment n.o.v. and remand with directions to reinstate the jury's award.

I.

The evidence presented to the district court established the following: Carlon, a division of Indian Head, Inc., manufactures and sells flexible plastic electrical conduit made from polyvinyl chloride (PVC). Electrical conduit is hollow tubing used in building construction to carry

insulated electrical wires through floors, walls, and ceilings, and outside buildings, and to protect the wires from damage or abuse. Carlon's product competes in the marketplace against steel conduit, of which Allied is the largest producer in the United States. Carlon claims that PVC conduit has a number of significant competitive advantages over steel conduit, including its pliability, its lower installed cost, and its lower susceptibility to short circuiting. On the other hand, as the district court instructed the jury, "there is a scientific basis for a concern about safety of PVC products with respect to toxicity . . . . the parties do not dispute that people disagree on the issue and there is an objective basis for a concern for safety." Allied particularly stresses the fact that, during fires in high-rise structures, PVC conduit may burn, emitting toxic smoke and fumes.

This case arises from Allied's efforts to block Carlon's proposal to include PVC conduit as a permissible type of electrical conduit in the 1981 edition of the National Electrical Code (NEC)—a model code, promulgated by the National Fire Protection Association (NFPA), which establishes product and performance requirements for electrical systems, including electrical conduit. The parties agree that NEC is the most widely disseminated and adopted model code in the world. The parties agree further that a substantial number of state and local governments adopt the NEC as law in whole or in part.[1]

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1. A survey, conducted by Allied and submitted to the district court in the Post-Trial Affidavit of John Lison, Allied's Vice President and General Counsel, shows the extent of the governmental reliance upon the NEC as of June, 1982: Of the 51 jurisdictions surveyed (50 states and the District of Columbia), 26 adopted the NEC through the process of incorporation by reference, without changing a word; an

Every three years, the NFPA—a private, voluntary organization composed of over 31,500 individual and group members representing industry, labor, academia, insurance, organized medicine, firefighters, and government—revises the NEC through a multi-step, several-year-long process. The NFPA first submits proposed amendments to the NEC to a Code-Making Panel (CMP) made up of professionals with technical expertise in the area. In order to prevent domination by special interests, no more than one-third of any CMP's membership may represent a single interest. If approved by the CMP, a proposal then goes to the full membership, together with the comments and voting position of each CMP member. After the membership has had an opportunity to comment on the proposal, the CMP considers it a second time, along with the membership's comments. If again approved, the NFPA publishes the proposed amendment to the full membership. The entire membership then votes.

In 1980, when Carlon's proposal was being considered, a simple majority of those present at the annual meeting was sufficient to approve or reject a proposal. Disappointed members can appeal the membership's vote to NFPA's Standards Council and ultimately to its Board of Directors. Finally, NFPA rules also permit *de novo* review of a defeated proposal by the CMP, the Standards Council, and the Board of Directors, in

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additional 19 adopted the NEC with amendments; those jurisdictions which amended the NEC before adopting it on average changed only 12 of its 114 articles; none of the remaining six adopted their own electrical code. Allied's survey also included all cities over 100,000 and a select group of 450 cities whose population exceeded 25,000. 495 cities responded, all with their own electrical code: 232 cities adopted the NEC exactly as written; 256 cities adopted the NEC and made amendments to it, on average changing only 11 articles.

a procedure known as a Tentative Interim Amendment (TIA). If adopted, a TIA includes or excludes a proposal on an interim basis until the next code cycle.

On September 18, 1978, Carlon began the process of obtaining NEC approval for PVC conduit by submitting its proposal, known as Article 331, to the NFPA, along with a fact-finding report by the Underwriters Laboratories. The NFPA directed the proposal to CMP-8, which initially rejected it. However, in December, 1979, based on further fact-finding and field demonstrations by Carlon, CMP-8 reversed its earlier decision and approved Article 331 for review by the full membership. The NFPA then scheduled the article for consideration by the full membership at the next annual meeting, to be held in Boston in May, 1980.

Recognizing that inclusion of PVC conduit in the NEC might adversely affect its sales of steel conduit, Allied's representatives met with a number of different groups, including other members of the steel industry, to gather votes in opposition to Article 331. On January 30, 1980, the Steel Rigid Conduit and Electrical Section of the National Electrical Manufacturers Association (NEMA) held a meeting to discuss the matter. At that meeting, and at a full meeting of the NEMA Steel Section held in February, everyone agreed to bring as many voters as possible to the upcoming NFPA meeting; Allied itself pledged to bring at least 100 people to vote against Article 331. Additional meetings and communications were held among the steel interests to coordinate their efforts to block Article 331's adoption. Acting within the letter of NFPA rules, Allied eventually arranged for 155 persons—including employees, sales agents, the agents' employees, company executives, employees of two of Allied's divisions, and the wife of the national sales director—to join the NFPA, to register as voting

members, and to attend the annual meeting to vote against the proposal. Allied also paid over $100,000 for the membership, registration, and attendance expenses of these voters. The other steel interests similarly recruited and paid for the expenses of voters at the May, 1980 meeting. In total, the steel interests gathered 230 votes.

Carlon made no attempt to sign up additional employees or sales agents other than the four already scheduled to attend the meeting. Until about April 18, 1980, H.F. van der Voort, who coordinated Carlon's efforts to amend the NEC, apparently believed that the NFPA's rules did not permit a motion from the floor to return Article 331 to CMP-8. On or about April 18, van der Voort discovered that such a motion could, in fact, be made. By this time, Carlon could not have signed up additional members to vote at the May meeting; under NFPA rules, only those who have been NFPA members for at least 30 days could vote at an annual meeting. However, Carlon did solicit support from members of the Society of Plastics Industry, the NEMA plastics section, other members of the plastics industry, NFPA's railroad and health care sections, and the Fire Marshals Association of North America.

At the annual meeting, Allied instructed its personnel where to sit, based upon a detailed seating chart, and appointed group leaders to instruct the voters "how the discussion is progressing and how to vote." Boxed lunches were provided and the voters were told to "stay nailed to their seats" until the end of two evening sessions. Group leaders used walkie-talkies and hand signals to facilitate communication. Few of Allied's voters had any of the technical documentation necessary to follow the meeting; nor did any of them speak in opposition to Article 331 in the course of the meeting.

Two votes were taken on the motion to return Article 331 to CMP-8. The first, a voice vote, was inconclusive. The second, a standing vote, approved the motion by a vote of 394-390. To insure its victory, Allied insisted that its representatives remain in their seats until 2:00 a.m., when the NFPA membership voted to approve the entire NEC without Article 331. Carlon immediately appealed the decision of the membership to the Standards Council, which referred the appeal to the Board of Directors. Finding that the NFPA rules had been circumvented but not violated, the Board denied the appeal, and returned Article 331 to the CMP-8. In June, 1980, Carlon applied for a TIA including Article 331 in the 1981 NEC. After the proposed TIA wound its way through the various levels of the code-making process, encountering opposition by Allied at each step, a subcommittee of the Board of Directors found that Carlon's request was not sufficiently exigent to warrant issuance of the TIA.

Carlon commenced this action against Allied and the NFPA on October 9, 1981, alleging that they, the American Iron & Steel Institute, other steel conduit manufacturers, and Allied's independent sales agents had "combined and conspired to prevent competition from non-metallic tubing by excluding it from the 1981 NEC" by "subverting the consensual standards rules and procedures of the NFPA."[2] After extensive pretrial proceedings, a bifurcated trial commenced on March 4, 1985 before Hon. John E. Sprizzo and a jury. Prior to the submission of the liability issues to the jury, Allied conceded that it had a pecuniary or commercial interest in seeing that PVC conduit was not included in the NEC;

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2. Prior to trial, Carlon discontinued with prejudice its action against the NFPA.

Allied also admitted that it had agreed with the other steel companies to oppose Article 331.

After four days of deliberation, the jury returned its verdict and also answered specific interrogatories submitted by the court. The jury found that Allied's conduct subverted the consensus standard-making process of the NFPA, and constituted an unreasonable restraint of trade in violation of the antitrust laws. Judge Sprizzo then charged the jury on Carlon's theory that it was injured by the stigma of its exclusion from the 1981 NEC and Allied's marketing of that exclusion.[3] Relying upon these instructions, the jury found that "as a proximate result of Allied's unreasonable restraint of trade in violation of the antitrust laws," Carlon lost $3.8 million in profits.

Following the trial, Allied moved for a judgment n.o.v., or, alternatively, for a new trial. Allied claimed that the *Noerr-Pennington* doctrine and the first amendment barred entry of judgment in Carlon's favor and attacked on various grounds the court's charge and the jury's findings. Judge Sprizzo rejected the charge and jury findings challenges but held that the *Noerr-Pennington* doctrine required that the jury's verdict be set aside.

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3. Carlon alleged that the stigma of not obtaining NEC approval of its product and Allied's "marketing" of that stigma caused independent marketplace harm to Carlon in those jurisdictions permitting use of PVC conduit, as well as those which later adopted the 1984 NEC, which permitted use of PVC conduit in buildings less than three stories high. It did not seek redress for any injury arising from the adoption of the NEC by the various governments. *See Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) (state action doctrine). The district court instructed the jury accordingly. Allied does not challenge the correctness of, or the foundation for, the jury's computation of the damage resulting from that stigma.

II.

[1] The *Noerr-Pennington* doctrine originated in a trilogy of Supreme Court cases. The Court first focused upon the tension between the first amendment and the Sherman Act in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). As part of an "economic life or death" struggle between the railroads and the emerging trucking industry over control of the long distance freight hauling market, the railroads began a deceptive publicity campaign designed to destroy the truckers' goodwill among their customers and the general public, and to advocate legislation that would hamper the trucking industry's ability to compete against the railroads. In a unanimous opinion authored by Justice Black, the Court reversed the judgment for the truckers, holding that Congress had not intended the Sherman Act to apply to "activities compris[ing] mere solicitation of governmental action with respect to the passage and enforcement of laws." *Id.* at 138, 81 S.Ct. at 530.

While noting the "essential dissimilarity" between joint efforts to seek legislation and "agreements traditionally condemned by § 1 of the Act," *id.* at 136, 81 S.Ct. at 529, the Court primarily feared that an expansive construction of the Act "would raise important constitutional questions" regarding the right to petition the government guaranteed by the first amendment. *Id.* at 138, 81 S.Ct. at 530. The Court refused to "lightly impute to Congress an intent to invade these freedoms," *id.*, especially because the legislative history of the Act provided no basis for concluding that the purpose of the Act was "to regulate, not business activity, but political activity. . . ." *Id.* at 137, 81 S.Ct. at 529. Notwithstanding, the Court cautioned: "There may be situations in which a publicity campaign, ostensibly

directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 144, 81 S.Ct. at 533.

In *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), the Supreme Court extended *Noerr's* exculpatory principles to attempts to influence the executive branch; the Court held that *Noerr* protected the efforts of large mine owners and union officials to squeeze out smaller coal producers by persuading the Secretary of Labor to raise minimum wage levels. Justice White stated that, "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Id.* at 670, 85 S.Ct. at 1593.

The last of the trilogy, *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), made three important contributions to the development of the doctrine: First, the Court applied *Noerr* to administrative and adjudicative proceedings. Second, it provided the Supreme Court's first application of the "sham" exception foreshadowed in *Noerr:* The Court held that a group of trucking companies' opposition to each and every license application made by their competitors " 'with or without probable cause, and regardless of the merits of the cases,' " did not deserve *Noerr-Pennington* immunity. Finally, in so holding, *California Motor Transport* made clear that the *Noerr-Pennington* doctrine rested squarely upon the first amendment rights of petition and association. *Id.* at 510-12, 92 S.Ct. at 611-12.

Noting that "the decision of the NFPA will be largely determinative of what the legislatures do," the district court concluded that there was "an intent to influence legislative action through the NFPA in this case, which is protected by *Noerr-Pennington*." Three previous district court decisions have reached similar conclusions. *Sessions Tank Lines, Inc. v. Joor Manufacturing, Inc.*, 1986-1 Trade Case (CCH) ¶ 66,989 (C.D.Cal.1986) (Western Fire Chiefs Association), *appeal docketed*, No. 86-6208 (9th Cir.); *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F.Supp. 833 (N.D.Ill.1983) (NFPA); *Rush-Hampton Industries v. Home Ventilating Institute*, 419 F.Supp. 19 (M.D.Fla.1976) (Southern Building Code Congress; International Conference of Building Officials; Building Officials and Code Administration International). These decisions rely upon two intertwined yet separable strands of argument: First, because state and local governments routinely enact the NEC into law, the NFPA takes on a "quasi-legislative" nature. Therefore, the argument goes, under *Noerr-Pennington*, attempts to influence the NFPA may be equated with attempts to influence the government. Second, because the NEC forms the basis for a substantial number of governmental codes, Allied's conduct should be construed as an indirect petition to state and local governments. As we conclude that Allied's "ballot stuffing"—a subversion of the NFPA code-making process—should not be deemed governmental petitioning, we find neither of these arguments persuasive.

A.

We decline Allied's invitation to extend *Noerr-Pennington* immunity to lobbying activities directed toward a "quasi-legislative" body such as the NFPA.[4] First, the policies which underlie the doctrine do not warrant such an extension. *Noerr's* holding depended upon the unique nature of petitions directed to the government in our political system: Justice Black focused upon the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws. . . ." 365 U.S. 139, 81 S.Ct. at 530. He explained that, "[i]n a representative democracy such as this, . . . government act[s] on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Id.* at 137, 81 S.Ct. at 529. The Court feared that applying the Sherman Act to "disqualify people from taking a public position on matters in which they are financially interested" could "deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." *Id.* at 139, 81 S.Ct. at 531. Moreover, "such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." *Id.* at 137, 81 S.Ct. at 529.

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4. Allied has stipulated that the NFPA is a "private, *non-governmental* organization." (emphasis added). Moreover, Allied has made no claim of any official delegation of governmental power to the NFPA. Thus, the NFPA's alleged "quasi-legislative" status results solely from the *de facto* "delegation" of law-making authority evinced by the extent of the reliance of the various governments upon the NEC.

These concerns do not apply with equal force to private organizations. Ideally, a legislature acts in the public interest. If it fails to do so, its members must answer to the constituents they represent. We must therefore allow an unrestricted flow of information to the government to ensure a complete consideration of the issues, secure in the reasonable expectation that our representatives will act in the public interest. No similar safeguards exist to prevent a private organization from adopting policies contrary to the interests of the general public—in the instant case, establishing an anticompetitive restraint of trade. *See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571, 102 S.Ct. 1935, 1945, 72 L.Ed.2d 330 (1982) (standard-setting organizations may "be rife with opportunities for anticompetitive behavior"); *see generally* Hurwitz, *Governmental Process, the First Amendment, and the Boundaries of Noerr*, 74 Geo.L.J. 65, 90-93 (1985).

As the Supreme Court stated in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45, 105 S.Ct. 1713, 1719, 85 L.Ed.2d 24 (1985), "[w]e may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *See also Hydrolevel, supra,* 456 U.S. at 571, 102 S.Ct. at 1945 ("Although, undoubtedly, most serve [private standard-setting organizations] without concern for the interests of their corporate employers, some may well view their position . . . , at least in part, as an opportunity to benefit their employers."). A private organization's agenda often will not coincide with, and may be directly contrary to, the interests of the broader public. Neither the organization, its membership, nor its leadership is checked by any accountability to the

general public. Moreover, even if the organization attempts to act in accordance with its conception of the public interest, that conception is necessarily colored by the composition of its membership. *See* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health,* 56 Tex.L.Rev. 1329, 1380-86 (1978) (private standard-setting organizations may not provide "sufficient participation by consumers, workers, and small business," and may not give "adequate consideration" to "certain noneconomic interests in developing a consensus when most of the partipants are representatives of economic interests").

Our concern that these organizations might operate contrary to the public interest becomes particularly acute in view of their importance within the economy. A private standard-setting organization "wields great power in the Nation's economy." *Hydrolevel, supra,* 456 U.S. at 570, 102 S.Ct. at 1944-45. The standards it develops and their interpretations " 'may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country,' as well as entire segments of an industry." *Id.,* quoting H.R.Rep. No. 1981, 90th Cong., 2d Sess., 75 (1968).

Second, extending *Noerr-Pennington* to such "quasi-legislative" bodies would raise serious practical problems: How many and which governmental bodies must enact a code before the organization takes on a quasi-legislative nature? To what extent does a code have to be enacted? If the governmental bodies decide to amend a code before adopting it, how extensive can the changes be before the members of the organizations lose *Noerr-Pennington* protection? The difficulty of answering such questions underscores the differences

between petitioning a governmental body and lobbying a private organization.

For the foregoing reasons, we find Judge Wisdom's opinion in *Feminist Women's Health Center, Inc. v. Mohammad,* 586 F.2d 530 (5th Cir.1978), *cert. denied*, 444 U.S. 924, 100 S.Ct. 262, 62 L.Ed.2d 180 (1979), to be persuasive authority. In *Mohammad*, an abortion clinic claimed that members of a nearby hospital's OB-GYN staff had conspired to restrain trade in the abortion market in the Tallahassee area. The defendant physicians had communicated their concerns about the ethics of some of the clinic's practices to a private organization of area physicians, to the Executive Director of the Florida Board of Medical Examiners (BOME), and to the head of residency at another hospital. At the same time, the physicians discussed their concerns amongst themselves. The district court granted summary judgment to the doctors, holding that the communications and discussions were protected under *Noerr-Pennington*.

The Fifth Circuit disagreed. The court distinguished between the communications addressed to the BOME, "a creature of state law," *id.* at 542, and the other communications. The former were "a form of activity . . . protected by the *Noerr-Pennington* doctrine absent proof of sham." *Id.* However, this protection did not extend to the other communications, even though state statutes vested the recipient organizations "with a kind of quasi-legislative authority." *Id.* at 545. State statutes permitted the BOME to take action against physicians disciplined by private medical groups, but did not require that it do so. Therefore, Judge Wisdom concluded, "[h]ospital medical staffs and medical societies play an important role in Florida's regulatory scheme, but that role is not a governmental one." *Id.* (footnotes omitted).

We believe that *Mohammad* has application here. State and local governments are no more required to enact the NEC into law than the BOME was required to act upon the conclusions of the private disciplinary groups in *Mohammad*. The fact that governments usually do accept the recommendations embodied in the NEC does not transform the NFPA into a governmental organ; consequently, attempts to influence the NFPA, a private organization, cannot claim *Noerr-Pennington* protection. *See also United States v. Johns-Manville Corp.*, 259 F.Supp. 440, 452-54 (E.D.Pa.1966) (recognizing that activities designed "to influence the decision of public officials" are protected under *Noerr-Pennington*, but refusing to grant summary judgment dismissing claims that defendant conspired to bring about the adoption of anticompetitive pipe specifications by two private organizations).

B.

We also reject Judge Sprizzo's conclusion that Allied's "intent to influence legislative action through the NFPA" brought its activities within the bounds of *Noerr-Pennington*. Allied's behavior, which itself caused independent antitrust injury to Carlon, should not be excused merely because its actions also indirectly influenced state and local governments. Simply put, Allied's conduct did not constitute petitioning of the government within the meaning of *Noerr-Pennington*; rather, its conduct was a subversion of the legitimate purposes of the NFPA.

First, in deciding whether group action falls within the bounds of *Noerr-Pennington*, several courts of appeals have drawn a distinction between the submission of a group's recommendations to the government and the antecedent conduct which generated those recom-

mendations. In *Mohammad, supra,* the Fifth Circuit distinguished between the actions of medical review committees in "reporting disciplinary findings and suspected violations to the BOME [which] may be petitioning activity within the meaning of the first amendment," and "communications within those groups[, which] are not." 586 F.2d at 545. Similarly, in *Litton Systems, Inc. v. American Telephone & Telegraph Co.,* 700 F.2d 785 (2d Cir.1983), we refused to grant *Noerr-Pennington* protection to a conspiracy to establish an anticompetitive tariff merely because the tariff was eventually filed with the FCC. We noted that "[t]he decision to impose and maintain the interface tariff was made in the AT & T boardroom, not at the FCC." *Id.* at 807. The fact that the FCC "might ultimately set aside" the tariff did "not transform AT & T's independent decision . . . into a 'request' for governmental action or an 'expression' of political opinion." *Id.* (footnote omitted). *See also United States v. Southern Motor Carriers Rate Conference, Inc.,* 702 F.2d 532, 542 (5th Cir.1983) (*Noerr* does not protect collective action by common carriers to establish anticompetitive rates which are eventually submitted to the state regulatory commission, but does protect the submission of those rates), *aff'g en banc,* 672 F.2d 469 (5th Cir.1982), *rev'd on other grounds,* 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). These decisions control the instant case.

Second, the district court's application of the *Noerr-Pennington* doctrine contravenes the maxim that "exemptions from the antitrust laws must be construed narrowly." *Union Labor Life Insurance Co. v. Pireno,* 458 U.S. 119, 126, 102 S.Ct. 3002, 3007, 73 L.Ed.2d 647 (1982). The policies behind the *Noerr-Pennington* doctrine—protecting the right to petition the government

and insuring an uninhibited flow of information to governmental representatives—do not require that Allied's anticompetitive behavior be ignored. Allied might have made its views known, and provided all the information it deemed relevant, by directly petitioning state and local governments at the adoption stage.

Nor are we swayed by Allied's contention that, because of the heavy reliance placed upon the NEC by various governments, the only effective method of influencing these governments is through the NEC amendment process. Allied's own survey shows that over half the states and cities polled either amended the NEC before adopting it or refused to adopt it at all. As the district court acknowledged, "there is obviously an opportunity to change the mind of the legislature and . . . there is an opportunity for the defendant and the plaintiff to lobby at that level. . . ."

Allied finally argues that a refusal to accord its behavior *Noerr-Pennington* protection would be inconsistent with the Supreme Court's grant of that protection to the railroad's publicity campaign in *Noerr*. *See also Federal Prescription Service v. American Pharmaceutical Association,* 471 F.Supp. 126, 130 (D.D.C.1979) (efforts to solicit support in a campaign to induce governmental action "were at least indirect attempts to influence governmental behavior" deserving protection), *aff'd*, 663 F.2d 253, 262 n. 6 (D.C.Cir.1981), *cert. denied,* 455 U.S. 928, 102 S.Ct. 1293, 71 L.Ed.2d 472 (1982). That holding, Allied contends, authoritatively abolishes any distinction between "direct" and "indirect" petitioning. However, in *Noerr*, the Court held that the railroad's publicity campaign did not violate the antitrust laws because "a publicity campaign to influence governmental action falls clearly into the category of political activity" to which the Sherman Act

does not apply. 365 U.S. at 140-41, 81 S.Ct. at 531. Congress, the Court concluded, had not intended the Sherman Act to have "application in the political arena" as "Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities. . . ." *Id.* at 141, 81 S.Ct. at 531. Allied cannot similarly claim that its conduct constituted "political activity" conducted within the "political arena."

III.

[2] On cross-appeal, Allied claims that, as a matter of law, its conduct did not constitute an unreasonable restraint of trade.[5] First, Allied argues that an industry participant in a private standard-setting organization should not be held liable under the antitrust laws where a genuine safety concern at least partially motivates its involvement in the process; the organization's rules prevent domination by commercial interests and accord due process to the participants; and objective scientific evidence supports the resulting standard. *Cf. Hydrolevel, supra,* 456 U.S. at 577, 102 S.Ct. at 1948 ("And in this case, we do not face a challenge to a good-faith

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5. As part of its cross-appeal, Allied also urges that the district court improperly submitted a separate special jury interrogatory asking whether Allied's opposition to Article 331 constituted the "least restrictive means" of expressing opposition to PVC conduit. Carlon argued to the court that the answer was potentially dispositive. Even though Judge Sprizzo disagreed with Carlon's legal theory, he did not abuse his discretion by submitting the question to the jury in order to avoid the possibility of a retrial, *see Litton Systems, supra,* 700 F.2d at 803 & n. 19, particularly because he made clear to the jury that the existence of less restrictive means "was not dispositive" of and was only "tangentially related" to Carlon's antitrust claim.

interpretation of [a private] code reasonably supported by health or safety considerations."). Allied points out that the fear of treble damages and judicial second-guessing might chill participation by financially interested industry members, who have an incentive to undertake the costly process of generating and gathering costly safety information. *See, e.g.*, M. Olsen, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1971) at 14-16. Moreover, while judges are specialists in procedural fairness, they will often have little expertise in the substantive area to which a standard applies. *Cf., e.g., Kletschka v. Driver,* 411 F.2d 436, 443 (2d Cir.1969) (The infeasibility of reviewing every decision and the lack of technical expertise in the substantive area means that "the courts should seek to discourage arbitrary agency action by enforcing the various procedural rights . . . and not by undertaking a full substantive review of the justification for the decision.").

However, in this case, Allied violated the integrity of the NFPA's procedures. The jury found that, although Allied acted within the letter of the NFPA's rules, its conduct "subverted" the code making process which Allied admits contained an inherent "potential for abuse." The record substantiates this conclusion: the steel interest's recruitment of the 230 members for a single vote gave it a disproportionate voice, inconsistent with the concept of "consensus" standard-making; few of Allied's recruits had the knowledge or inclination to make an independent decision on the merits of the issue; the industry reacted negatively to what the trade magazines termed the conversion of NFPA's "code-making process . . . into a battleground for establishing commercial preference for competing product types;" on Carlon's appeal, the NFPA Board of Directors found

that Allied had "circumvented" NFPA rules; Jack Sanders, chairman of an NFPA committee formed to review its voting procedures after the May, 1980 meeting, testified that Allied's actions were inconsistent with the intent of those procedures; following, and as a direct result of, Allied's conduct, the NFPA amended its rules to prevent a recurrence of the PVC conduit vote; finally, Judge Sprizzo sustained the jury's verdict against Allied's challenges. In short, Allied packed the annual meeting with newly registered members, whom it subsidized, for the sole purpose of achieving an anticompetitive result—the exclusion of PVC conduit from the marketplace. We refuse to permit a defendant to use its literal compliance with a standard-setting organization's rules as a shield to protect such conduct from antitrust liability.

Nor do we find any merit in Allied's claim that it should not be held liable under the antitrust laws because the exclusion of PVC conduit from the 1981 NEC was supported by objective scientific evidence. The "objective validity" of a restraint has never been a defense to an antitrust charge, cf. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98, 47 S.Ct. 377, 379-80, 71 L.Ed. 700 (1927) (reasonableness of price is not a defense to a price fixing charge).

IV.

The judgment of the district court is vacated and remanded with directions to reinstate the jury's award.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on October 26, 1987, I served the within *Petition for a Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

David E. Lundin, Esq.
Finley, Kimble, Wagner, Heine,
Underberg, Manley, Myerson
& Casey
101 Broadway
Suite 1500
San Diego, California 92101

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 26, 1987, at Los Angeles, California.

Siri Ved Kaur Khalsa
(Original signed)